IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0676

STATE OF WEST VIRGINIA *ex rel.* WEST VIRGINIA-AMERICAN WATER COMPANY,

Petitioner,

v.

THE HONORABLE CARRIE L. WEBSTER, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, PRESIDING JUDGE; RICHARD JEFFRIES, individually and on behalf of all others similarly situated; and COLOURS BEAUTY SALON, LLC,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

1. Did the circuit court misapply this Court's guidance in *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (2019), and commit a clear error of law in finding commonality under W. Va. R. Civ. P. 23(a)(2) where (a) liability under the statute and regulations on which Plaintiffs base their claims cannot be determined without consideration of individual water service impact and (b) water service impact cannot be determined on a classwide basis?

2. Did the circuit court commit a clear error of law when it found typicality under W. Va. R. Civ. P. 23(a)(3) despite the admitted differences in potential water service impact between the named plaintiffs and other class members?

3. Did the circuit court commit a clear error of law when it certified a liability issue class under W. Va. R. Civ. P. 23(c)(4) without requiring Plaintiffs to demonstrate satisfaction of predominance and superiority under W. Va. R. Civ. P. 23(b)(3) and without clearly identifying the "issue" and standards it applied?

4. Did the circuit court commit a clear error of law in finding predominance under W. Va. R. Civ. P. 23(b)(3) without identifying all of the individualized duty, breach/injury, and causation issues related to water service impact that are inextricably intertwined with any determination of liability or fault and would predominate over the issues to be addressed on a classwide basis?

5. Did the circuit court commit a clear error of law in finding superiority when resolution of the liability issues certified will not dispose of the issue of liability or, as conceded by Plaintiff, eliminate the need for individual trials for each class member?

6. Did the circuit court commit a clear error of law in defining a class that was broader than the court evaluated for ascertainability and by not articulating an administratively feasible method for identifying and providing notice to non-customer class members?

II. STATEMENT OF THE CASE

A. Introduction

The answer to each of the above questions is "Yes." Plaintiffs' claims arise from a June 2015 leak and subsequent repairs on one of WV American's transmission mains. The circuit court certified a liability "issues" class under West Virginia Rule 23(c)(4), erroneously finding that liability could be determined under the statute and regulations relied on by Plaintiffs (and providing for "reasonable" or "continuous" service to customers) without **any** consideration of water service impacts. But water service impacts must be considered to determine liability for Plaintiffs' claims and those impacts cannot be demonstrated on a classwide basis. The need for individual trials to determine impact renders this case inappropriate for class certification under West Virginia Rule 23. This Court should issue the requested Writ because the circuit court committed clear legal error and exceeded its legitimate powers by granting class certification.

B. Background and Procedural History

1. The June 2015 Water Main Break and Repairs

Plaintiffs' claims arise from a break or leak on a 36-inch prestressed concrete cylinder pipe transmission main located in Dunbar, West Virginia. Plaintiffs' complaint alleged two separate events impacting different customers in different ways at different times. Plaintiffs claim initial break, on June 23, 2015, caused "outages and inadequate water pressure to approximately 25,000 WVAW customers." App. at 20; Compl. ¶8. The break was repaired and water service restored on June 27, 2015. App. at 20; Compl. ¶9. Then, on June 29, 2015, Plaintiffs claim, "another problem developed at the site of the initial break, which caused an additional interruption in service to thousands of the same customers." App. at 20; Compl. ¶10. This leak, which impacted fewer customers, was repaired and full water service with adequate pressure was restored no later than by July 1, 2015. App. at 20; Compl. ¶11. Plaintiffs claim that due to the main breaks and

subsequent repairs, customers "experienced a complete interruption of service, others suffered a decrease in pressure, while others experienced a boil water advisory." App. at 2; Findings of Fact ¶2.

2. Plaintiffs Bring Class Action Complaint Based on Violation of Statute and Regulations

On June 2, 2017, Plaintiffs filed a class action Complaint in the Circuit Court of Kanawha County seeking to certify a class under W. Va. R. Civ. P. 23(b). App. at 16-32. No mention was made of W. Va. R. Civ. P. 23(c)(4). The Complaint's central allegation across all four stated claims is that in June 2015 WV American failed to perform its contractual, statutory, and common law duties "when it failed to supply usable tap water or adequate water pressure to approximately 25,000 customers for a period of three or more days." App. at 23; Compl. ¶24.

Count I: Breach of Contract — Duty to Supply Water

> Regulatory basis of claim: "One of the PSC water rules incorporated into the contract that WVAW had with all of its customers in June 2015 provides: 'The utility's approval of an application for water to be supplied to any premises shall constitute *a right to the customer to take and receive a supply of water* for said premises for the purposes specified in such application (i.e. Residential, Commercial, and Industrial) subject only to the fulfillment of the conditions of these rules by the customer.' W. Va. C.SR. § 150-7-4.1.e.4" (emphasis added). App. at 22; Compl. ¶23.
>
> Alleged breach: "WVAW failed to perform that contractual obligation in June 2015 when it failed to supply usable tap water or adequate water pressure to approximately 25,000 customers for a period of three or more days. App. at 23; Compl. ¶24.

Count II: Breach of Contract — Duty to Maintain Facilities to Provide Adequate and Continuous Service

> Regulatory basis of claim: "Another of the PSC water rules incorporated into the contract that WVAW had with all of its customers in June 2015 provides: 'Each utility shall at all times construct and maintain its entire plant and system in such condition that it will *furnish safe, adequate and continuous service.*'" App. at 23; Compl. ¶28 (emphasis added).
>
> Alleged breach: "Whether one interprets that provision literally, to mean uninterrupted service, as Plaintiffs believe it should be interpreted, or as a duty to

provide service with 'reasonable continuity,' as WVAW will no doubt argue, WVAW clearly failed to fulfill that contractual promise to its customers, including Plaintiffs, when 25,000 customers lost water for three or more days in June 2015." App. at 23; Compl. ¶29.

Count III: Violation of Statutory Obligations

Statutory basis of claim: "West Virginia Code § 24-3-1 provides, in relevant part: 'Every public utility subject to this chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and *shall perform such service in respect thereto as shall be reasonable, safe and sufficient* for the security and convenience of the public.'" App. at 25; Compl. ¶36 (emphasis added).

Alleged violation: "WVAW clearly violated its statutory duty to its customers when 25,000 customers lost water for three or more days in June 2015." App. at 25; Compl. ¶38.

Alleged violation: "However generously one may interpret that section of the West Virginia Code, an outage impacting 25,000 customers for at least three days does not comport with the duty to provide service that is 'reasonable.'" App. at 25 Compl. ¶39; *id.* at 25, Compl. ¶40 (same allegation for "sufficient" service).

Count IV: Negligence

Regulatory basis of claim and alleged negligence: "All of the conduct described in the preceding two paragraphs was also in violation of the PSC water rules, including but not limited W.Va. C.S.R. § 150-7-5.1.a, and was therefore unreasonable *per se*." App. at. 27; Compl. ¶52.

3. Class Certification Briefing

Plaintiffs moved for certification of an "issues" class under West Virginia Rule 23(c)(4) to determine WV American's "liability" under the statutory and regulatory provisions cited in the four counts of the Complaint. App. at 44. Plaintiffs stated that they were not pursuing class treatment of whether and to what extent class members incurred damages and that such issues could be addressed individually in later phases.[1] Plaintiffs' memorandum addressed the requirements Rule 23(a) but failed to even mention the predominance and superiority requirements

[1] Plaintiffs also sought determination of a class-wide punitive damages multiplier (whether and to what degree or ratio that punitive or exemplary damages should be imposed). The circuit court denied class certification on that issue. App. at 9-10; Conclusions of Law ¶12.

in Rule 23(b)(3). Plaintiffs described the proposed class as "consisting of WVAW's residential and business customers and other households and businesses supplied tap water in the counties of Kanawha and Putnam that lost water pressure and tap water service as a result of the Dunbar main break." App. at 49. Plaintiffs alleged that a map created by their engineering expert Wayne Lorenz defined the boundaries of the proposed class by general geographic location, without any evidence of actual impact to individual class members. App. at 51.

WV American responded that Plaintiffs failed to demonstrate that the commonality and typicality requirements in Rule 23(a) were met. App. 111-26. The question of "liability" was not appropriate for class resolution because: 1) determining liability under each of Plaintiffs' causes of action requires examination of water service impact and 2) water service impact can only be determined through individualized inquiry that is not suitable for classwide resolution. *Id.* Whether WV American is liable to class members under the statute and regulations relied on by Plaintiffs requires a determination whether "safe, adequate and continuous service" was maintained to customers, W. Va. C.S.R. § 150-7-5.1.a; whether customers received a "supply of water," *id.* § 150-7-4.1.e.4; and whether "adequate and suitable" facilities are maintained, West Virginia Code § 24-3-1. These determinations require consideration of individual impact – whether, how, and how long a class member's water service was actually impacted – which Plaintiffs concede cannot be determined classwide. App. at 128-34. WV American also opposed certification because Plaintiffs failed to address or demonstrate predominance and superiority under Rule 23(b)(3), failed to identify an ascertainable class, and certified an improper "issues" class under Rule 23(c)(4). App. at 126-39.

Plaintiffs replied with several new arguments. They argued for the first time that their liability claims were based "entirely" on WV American's actions *before* the June 23, 2015 main

break *without any consideration of water service impact*. App. at 364. Plaintiffs unveiled a Trial Plan that proposed a class trial phase in which only WV American's pre-break actions or omissions would be tried to determine WV American's classwide liability. App. at 376-81. Plaintiffs asserted that all water service impacts are related exclusively to damages to be dealt with in later "phases" after "liability" was decided. App. at 365 (asserting that liability "definitely cannot [be] based on the actual scope and scale of the main break"). Plaintiffs further argued they were not required to comply with Rule 23(b)(3) predominance and superiority requirements for their proposed "issues" class. App. at 360. Plaintiffs also revised their class definition. App. at 372.

4. The March 11, 2020 Class Certification Hearing

The circuit court held argument on the certification motion on March 11, 2020. Plaintiffs argued (from their Reply) that liability could be determined solely based on evidence of WV American's acts or omissions *before* the June 2015 main break without any reference to the existence or extent of water service impact: "Certainly what happened to any individual customer doesn't matter for purposes of this liability determination." App. at 538; *see id.* at 533-34 ("It doesn't matter if you lost all your water on that day. It doesn't matter if you only suffered a little drop in pressure. It doesn't matter if all you had was a boil water advisory. It doesn't matter if you weren't affected. The answer to the question is still the same."). Plaintiffs proposed that after a classwide "Phase I" trial determined "liability," the court could hold short individual "Phase II" trials of three to four hour to determine each class member's damages, if any. App. at 630. "[E]ach person would have to come in here, whether it's Ms. Burdette or Mr. Jeffries or anybody else, and, to prove damages have to say, I lost water, this was my experience, these are my damages." App. at 614. WV American presented its arguments that Plaintiffs' evidence did not satisfy Rule 23's

commonality, typicality, predominance and superiority, and ascertainability requirements as interpreted by this Court and that a Rule 23(c)(4) issues class was not appropriate.

5. The July 14, 2020 Certification Order

After discussing its ruling in a status conference on June 11, 2020, the circuit court entered a July 14, 2020 order certifying an issues class under Rule 23(c)(4) to determine WV American's "liability," agreeing with Plaintiffs that liability could be fully determined without consideration of water service impact. App. at 1-12. The court found that water service impact was exclusively a damages issue so "the relevant liability evidence does not depend on a showing of damages on an individual basis or what happened in the event to individual customers." App. at 7; Conclusions of Law ¶9. The circuit court concluded: "This action shall be certified and maintained as a class action with respect to particular issues pursuant to West Virginia Rule of Civil Procedure 23(c)(4), with respect to the overarching common issues of whether Defendant is liable for breach of contract and negligence, and for actionable violation of its statutory duties under the West Virginia Code." App. at 11; Conclusions of Law ¶15. The court also identified a new class definition: "[A]ll WVAW customers, residents and businesses located within the boundaries of the service area served by the 36-inch water main that broke." App. at 10; Conclusions of Law ¶14.

C. Record Evidence Regarding Individual Impact from the Events

Evidence contained in the record below regarding the determination of potential individual impacts associated with the June 2015 events is critically important to determining whether Plaintiffs satisfied the Rule 23(a) and (b)(3) requirements for class certification. Both parties presented expert testimony regarding class issues.

WV American's Kanawha Valley distribution system is geographically large and hydraulically complex under normal operating scenarios. App. at 247; *see also* West Virginia

Water Company, Case No. 15-0675-s-42T (W. Va. P.S.C., February 24, 2016) (explaining WV American's ability and willingness to provide reliable water service to unserved or underserved areas has resulted in a system that is large and geographically disbursed with difficult terrain). Plaintiffs' engineering expert Lorenz acknowledged this complexity, and further agreed that the system's complexity increased during the June 2015 main break and subsequent repairs due to unusual system hydraulics and WV American's actions to route water to areas typically served by the 36" main that was isolated for repairs. App. at 244-47.

WV American's expert engineer, Michael Jacobson, explained that due to the complexity of the system, determining the impact on any customer resulting from the main break required individual analysis. App. at 275-76 ("The particulars of the June 2015 event and the operation of the distribution system, in conjunction with the distribution system hydraulics and factors unique to each customer, would have resulted in variability in the type of effect experienced by different customers, as well as the variability in the duration and time of any effect experienced."). Plaintiffs agreed that a customer's location will determine impact: "[I]t doesn't matter whether you're somebody who luckily because you were lower in elevation or there happened to be a large amount of water in the tank near you, you stayed in water for a long time or whether you lost water right away as somebody closer to the break." App. at 539-40. Lorenz also acknowledged that determining impact for any customer requires an individualized analysis of factors that include the physical characteristics of a customer's location, such as elevation and proximity to distribution system assets, and system status information relevant to that location. App. at 242-43. Because the system status constantly changed during the event, any evaluation would have to identify changing impacts at each customer location over time. App. at 242.

Plaintiffs have alleged (and never disputed) that "individual class plaintiffs may have suffered different consequences from having lost water supply as the result of Defendant's misconduct." App. at 51. For those impacted, the type and duration of impact varied: some customers experienced "complete interruption of service, others suffered a decrease in pressure, while others experienced a boil water advisory."[2] App. at 51. Plaintiff Richard Jeffries testified that his only impact was one day of decreased water pressure at his home, while Carolyn Burdette claimed that Colours Beauty Salon had no water for at least five or six days. App. at 157; 200-01; 214. Plaintiffs also acknowledged their proposed class may include (and thus WV American could be found liable to) individuals who "may have experienced no adverse effects and have no claim for damages." App. at 367.

Plaintiffs submitted a map created by Lorenz that they represented as identifying the geographic boundaries of the proposed class. App. at 498. However, Lorenz's map depicted only pressure zones in the Kanawha Valley water system that he asserted were "impacted" or "potentially impacted" due to the main break, App. at 498, based on whether he determined a water tank level or booster station pressure reading within the zone was "out of the ordinary." App. at 241-42. Lorenz expressed concerns about the accuracy of certain data underlying his map. App. 247-50. He did not analyze whether individual customers within the map were actually impacted by the "out of ordinary" readings. App. 247-50. When asked if he had done an analysis that would allow him to assess whether there were individual customer impacts, Lorenz responded: "No. I

[2] WV American issued Precautionary Boil Water Advisories ("BWA") instructing customers "west of Dunbar in the company's Kanawha Valley system" on precautionary measures to take if they had experienced "very low water pressure or a disruption in water service." Thus, application of Precautionary BWAs to an individual customer depended on individual water impact and did not apply to the customers in the area who had not experienced a water service impact. App. 484-86.

mean, not – not specifically here. You know, we haven't contacted customers to go interview them to find out what their impact was." App. at 241-42.

III. SUMMARY OF ARGUMENT

The class action mechanism is appropriate only where the important protections in West Virginia Rule 23(a) and (b) have been demonstrated by plaintiffs and verified by the circuit court following thorough analysis. Plaintiffs could not meet that burden for the entirety of their claims and thus proposed a more narrow "liability" issues class under Rule 23(c)(4). But Plaintiffs' approach to Rule 23(c)(4) would allow effectively automatic class certification without adequately applying the balancing factors under Rule 23. In this case, the circuit court's certification of a "liability" issues class focused solely on the actions of WV American *before* the event subjects WV American to the enhanced risk of a classwide liability finding without requiring Plaintiffs to demonstrate the actual water service impact, if any, on the class members. In granting certification, the circuit court committed the following clear errors of law.

First, the circuit court misapplied this Court's recent guidance in *State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot,* 242 W. Va. 54, 829 S.E.2d 54 (2019), by finding that commonality was "easily met in this case." The question of liability for Plaintiffs' claims – the question the circuit court singled out for classwide resolution – does not provide a common answer. Liability, as defined by the statute and regulations forming the basis of Plaintiffs' claims, is a question of whether WV American is liable for breach of duty to supply water to its customers, duty to "furnish safe, adequate and continuous service" to its customers, or obligation to supply "reasonable, safe and sufficient" service. Thus, the question of liability can only be answered by examining the water service provided during the event and deciding whether it constitutes reasonable service. And the question of liability can produce a common answer only if water service impact

can be examined on a classwide basis. There is no dispute that it cannot. Though they incorrectly characterize impact as relating solely to determining damages, Plaintiffs concede, and the circuit court acknowledged, that determining whether, and if so how, a class member's water service was impacted requires individual inquiry that is not appropriate for classwide resolution. Because the statute and regulations that define liability for the Plaintiffs' claims necessarily require a review of the water service impact on individual class members that cannot be undertaken classwide, the circuit court erred in finding commonality.

Second, the circuit court's typicality analysis is cursory and fails to take into account the connection between individual impact and liability under Plaintiffs' claims. Plaintiffs concede, and the testimony of the named plaintiffs confirms, that there are significant differences in impact across the defined class that defeat typicality.

Third, the circuit court incorrectly applied West Virginia Rule 23(c)(4) to certify a "liability" issues class. This Court has not addressed Rule 23(c)(4) "issues" certification but federal courts make clear that issues classes are not exempt from the Rule 23(b)(3) predominance and superiority requirements. The circuit court did not require Plaintiffs to demonstrate satisfaction of Rule 23(b)(3) and failed to clearly identify either the issues it evaluated or the standard it applied in finding that Rule 23(c)(4) certification was appropriate in this case.

Fourth, the circuit court committed a clear error of law by failing to conduct a thorough analysis of the predominance requirement under Rule 23(b)(3). The circuit court failed to identify the full range and complexity of individualized issues that will remain for separate trials after the class proceeding.

Fifth, the circuit committed a clear error of law by finding that class action was "clearly superior" to other case management approaches under Rule 23(b)(3). The "issues" class certified

by the circuit court will not finally resolve the liability of a single class member. Plaintiffs concede that individual trials will still be required for every class member to address a range of issues regarding the impact on class members, as well as any damages. Courts regularly find class actions are not superior and deny class certification under Rule 23(c)(4) in these circumstances.

Sixth, the class defined by the circuit court is not ascertainable. The court's evaluation of ascertainability was limited to a class of WV American customers. However, the court's final class definition includes non-customers, without identifying any administratively feasible method for identifying and providing notice to those non-customers.

The circuit court's findings constitute clear errors of law that support issuance of a Writ of Prohibition vacating and reversing the certification order. If this Court does not fully reverse, at a minimum, it should remand to the circuit court with instructions to re-evaluate certification and provide adequate justification and detailed explanation of its findings under Rule 23.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary and would greatly aid the decisional process. Oral argument should be granted under W. Va. R. App. P. 20 because the certification of an issues class against a regulated utility under provisions providing for reasonable service, without any consideration of impact, presents an issue of fundamental public importance to water companies, public service districts and other utilities in West Virginia. Under Plaintiffs' theory, a utility can be subject to class treatment of liability issues without classwide evidence of service impacts. This case provides an opportunity for the Court to issue guidance regarding the requirements for "issues" classes under W.Va. R. Civ. P. 23(c)(4), an issue of first impression in West Virginia. The Court can also issue further guidance on the proper application of W.Va. R. Civ. P. 23 to provide for more consistent application of class certification requirements in West Virginia circuit courts.

V. ARGUMENT

Rule 23 of the West Virginia Rules of Civil Procedure governs class action certification, and the burden of meeting each requirement under the Rule lies solely with the party requesting certification. *In re W. Va. Rezulin Litig.*, Syl. Pt. 4, 214 W. Va. 52, 585 S.E.2d 52 (2003). A class action may only be certified if the trial court is satisfied, after a thorough analysis, that the Rule 23 prerequisites have been satisfied. *See Gaujot*, Syl. Pt. 1, 242 W. Va. 54, 829 S.E.2d 54; *see also State ex rel. Erie Ins. v. Nibert*, 2017 WL 564160, at *2 (W. Va. Feb. 13, 2017).

A. Issuance of a Writ of Prohibition is appropriate to address the circuit court's clear error in misapplying West Virginia law.

This Court has repeatedly recognized that "[w]rits of prohibition offer a procedure... preferable to an appeal for challenging an improvident award of class standing." *State ex rel. Mun. Water Works v. Swope*, 242 W. Va. 258, 835 S.E.2d 122 (2019); *State of W. Virginia ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 450, 607 S.E.2d 772, 779 (2004). On Petition for Writ of Prohibition, the Court reviews the order of the circuit court granting class certification to determine whether it exceeded its legitimate powers. *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 800 S.E.2d 506 (2017). To make this determination, the Court applies the test in *State ex rel. Hoover v. Berger*:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. Pt. 4, 199 W. Va. 12, 483 S.E.2d 12 (1996). "These factors are general guidelines that serve as a useful starting point[.] While we need not find that all factors are present, we attach 'substantial weight' to the factor that asks 'whether the lower tribunal's order is clearly erroneous

as a matter of law[.]'" *Gaujot*, 242 W. Va. at 61, 829 S.E.2d at 61 (quoting *Rezulin*, 214 W. Va. at 62, 585 S.E.2d at 62). Here, these factors weigh heavily in favor of granting the requested Writ.

A Writ Petition is the only avenue of review from the circuit court's Order Granting Class Certification. Absent such review, WV American will only be able to obtain appellate review after trial. WV American will suffer irreparable harm by being forced to litigate against an inappropriately certified class. *See State ex rel. City of Huntington v. Lombardo*, 149 W. Va. 671, 413 S.E.2d 535 (1965) ("Writs of prohibition are "preventive remed[ies]. One seeking relief by prohibition in a proper case is not required . . . to . . . wait until the inferior court or tribunal has taken final action in the matter in which it is proceeding or about to proceed..."). In addition, the circuit court exceeded its legitimate authority and made a clear error of law in certifying a class where Plaintiffs failed to satisfy the Rule 23 requirements as mandated by this Court in *Gaujot, Nibert, and Swope*. This case also addresses an issue of first impression for this Court because WV American disputes the circuit court's certification of an "issues" class under W. Va. R. Civ. P. 23(c)(4). Accordingly, consistent with W. Va. R. App. P. 16, WV American requests that this Court issue a scheduling order requiring a response to this Petition, and then issue a rule to show cause and stay of further proceedings pending resolution of the Writ.

B. The circuit court committed a clear error of law in finding Plaintiffs satisfied the commonality requirement of Rule 23(a)(2).

The circuit court misapplied the applicable legal standard articulated by this Court in *Gaujot* by determining that commonality was "easily met." App. at 5; Conclusions of Law ¶3. Interpreting West Virginia Rule 23(a)(2), this Court has stated that commonality requires that class members' claims "must depend upon a common contention[,]" which "must be of such a nature that it is capable of classwide resolution[.] The issue of law (or fact) in question "must be one whose determination . . . will resolve an issue that is central to the validity of each one of the claims

in one stroke." Syl. Pt. 3, *Gaujot*, 242 W. Va. at 54, 829 S.E.2d at 54 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551 (2011) (internal quotations and citations omitted)). "It is not enough for [Plaintiffs] to allege that they and others like them are victims of the same statutory violation." *Gaujot,* 829 S.E.2d at 59; *see also Nibert*, 2017 WL 564160, at *2 (finding that "a violation of law as a common issue may not support class certification in a setting where individualized fact-finding is necessary").

The circuit court's commonality finding is fatally flawed. The court erred in finding that a determination of liability "does not depend on a showing of damages on an individual basis or what happened in the event to individual customers." App. at 7; Conclusions of Law ¶9. Individual impact, however, is a critical element of liability under the statute and regulations on which Plaintiffs rely. WV American cannot be found "liable" or to have breached duties to supply water or to provide continuous or reasonable service without an evaluation of whether those conditions existed for individual water users. Thus, as in *Gaujot*, "the determination of commonality necessarily required a review of the alleged harm suffered by the plaintiffs" and "at least an initial review of the merits." 242 W. Va. at 63, 829 S.E.2d at 63. However, unlike in *Gaujot*, the record here clearly demonstrates that the required showing of water service impact was not and cannot be demonstrated on a classwide basis. Plaintiffs and the circuit court recognize that determining impacts would require a separate trial for each class member. Therefore, rather than returning this case to the circuit court, this Court should conclude that the circuit court committed incurable legal error and fully vacate the class certification order.

1. The circuit court clearly erred when it determined that liability under the statute and regulations forming the basis of Plaintiffs' claims could be determined without consideration of water service impact.

The circuit court clearly erred in finding that evaluation of water service impact has no relevance to liability for Plaintiffs' claims. To determine whether "liability" issues can satisfy

commonality under Rule 23(a)(2), a court must identify the required elements of liability under Plaintiffs' causes of action and whether those elements are appropriate for classwide resolution. *See Swope*, 835 S.E.2d at 131 (thorough analysis of Rule 23(a) factors requires "clearly delineating the contours of the class along with the issues, claims and defenses to be given class treatment"). This analysis requires consideration of the merits of Plaintiffs' claims as necessary to assess the class certification requirements. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) ("[C]lass determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff[ ]s[']' cause of action."); Syl. Pt. 8, *Gaujot*, 829 S.E.2d 54, 829 S.E.2d 54 ("When consideration of questions of merit is essential to a thorough analysis of whether the prerequisites of Rule 23 of the West Virginia Rules of Civil Procedure [2017] for class certification are satisfied, failing to undertake such consideration is clear error and an abuse of discretion.").

The circuit court agreed with Plaintiffs' argument that liability can be "fully determined" based entirely on WV American's actions prior to June 23, 2015, without consideration of water service impact. App. at 4-5; Conclusions of Law ¶2. This conclusion cannot be squared with the plain language of the standards on which Plaintiffs rely for their liability claims, which turn on whether "safe, adequate and continuous service" was maintained to customers, W. Va. C.S.R. § 150-7-5.1.a; whether customers received a "supply of water," *id.* § 150-7-4.1.e.4; and whether "adequate and suitable" facilities are maintained, West Virginia Code § 24-3-1. Whether WV American is liable for breach of these duties (in contract or tort) to class members requires determination of whether and how individual class member's water service was actually impacted.[3] The circuit court failed to make that necessary inquiry as required under *Gaujot*.

[3] Prior to changing focus in their class certification briefing, Plaintiffs consistently described impact as the trigger for liability. App. at 18-30 (alleging loss of water or "adequate water pressure" to approximately 25,000 customers for a period of three or more days); *see also* App. at 1038 ("The gist of this action is the *breach of a statutory obligation to*

In *Gaujot*, the hospital's uniform fixed pricing policy did not satisfy commonality because it was not determinative of liability as defined by the statute at issue, which defined liability as whether the amount charged for a record exceeded the actual expenses incurred to produce that record. 242 W. Va. at 63-64, 829 S.E.2d at 63-64 ("The fact that the Hospitals charged all class members by the page (or by the image) does not change the statute or the fact that the statute's terms define the boundary between lawful and unlawful charges."). The same is true here – the statute and regulations on which Plaintiffs rely define the boundary between liability and no liability as dependent on individual customer water service impact. Findings related to WV American's pre-break actions will not determine liability to individual class members. A jury cannot decide whether WV American breached a duty to supply water to its customers, a duty to supply continuous service to its customers, or an obligation to supply reasonable service without considering whether and how water service was actually impacted[4] for individual customers.[5] The circuit court erred by disregarding the relevant language underpinning Plaintiffs' claims.

The circuit court further erred in treating water service impact and the consequences of that impact as interchangeable with and solely related to damages. *See* App. at 5; Conclusions of Law ¶3 ("The fact that there may have been individual members of the Class that suffered different consequences from having lost water are immaterial for purposes of commonality. Plaintiffs' theories of liability apply equally to all members of the Class, and damages suffered by individual

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provide competent water service to customers and non-customers alike who by statute have a private right of action to sue for recovery of damages in circuit court.") (emphasis added).

[4] The circuit court's statements in the June 11 hearing show recognition of the interrelationship between an individual class member impacts and determinations of breach or liability under the provisions relied on by Plaintiffs. *See* App. at 580 ("I don't think, you know, the fact that you lose water pressure, per se, means that, you know, they -- they breached [the] act.").

[5] Judge Copenhaver's decision to certify an issues class in *Good* does not compel the same conclusion here. Though the claims were brought in that case under the same provisions, the impact on the class members was uniform and capable of classwide determination because all of the class members received the same order not to use their water. *Good v. Am. Water Works Co.*, Inc., 310 F.R.D. 274, 296 (S.D.W. Va. 2015).

class members as the result of Defendant's conduct will not defeat commonality."). The circuit court's conclusion fails to distinguish between the fact and degree of impact (whether and for how long a class member lost water), which is a necessary element of Plaintiffs' claims, and the independent determination of the amount of damages incurred as a result of the impact. Though the relevant facts are intertwined, Plaintiffs still bear the burden to prove the existence and extent of each customer's service impact to establish **both** liability to that customer **and** the amount of damages incurred. *See Gaujot*, 242 W. Va. at 63, 829 S.E.2d at 63 ("Whether each charge for medical records exceeded the Hospitals' actual 'reasonable expenses incurred' raises questions that relate to both liability and, if liability is determined, the amount of the damages incurred.").[6]

Plaintiffs' and the circuit court's truncated view of the elements of "liability" present severe legal and practical implications for utilities like WV American. Planned or unplanned events that may impact water service for some customers are part of the operational and maintenance cycle for water utilities as they balance management of complex distribution systems with the need to preserve reasonable rates for their customers. Designing water systems to be fully redundant or immune from all events impacting service is not consistent with maintaining affordable service. Yet, under the circuit court's holding, every break or maintenance event that could have an impact on service becomes a candidate for "liability" class certification. Plaintiffs could merely identify the event as the "common" issue and the defendant could then face a jury determination that it was "liable" to an entire class of customers, without any evidence that the event unreasonably impacted

[6] The cases cited by the circuit court regarding commonality, App. at 5, Conclusions of Law ¶3 are not on point or persuasive in light of *Gaujot* and other recent decisions from this Court. *Leach v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1270121, at *1 (W. Va. Cir. Ct. Apr. 10, 2002), is a circuit court case and of limited value because it was later settled. *See Rhodes v. E.I. du Pont de Nemours & Co.*, 253 F.R.D. 365, 379-80 (S.D.W. Va. 2008) (rejecting plaintiffs' arguments that the *Leach* settlement supported class certification). The court in *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 135 (E.D. La. 2013), was evaluating a class action *settlement*.

the putative class members. The circuit court's approach is not consistent with the protective principles requiring thorough analysis of Rule 23 requirements as articulated by this Court in *Gaujot*. Syl. Pts. 1-3, 8, 242 W. Va. 54, 829 S.E.2d 54.

2. Water service impact, and therefore liability, requires individualized and complex inquiry that is not appropriate for classwide determination.

Plaintiffs rely upon statutes and regulations that expressly define the boundary between liability and no liability as dependent on customer water service impact. Thus, liability can be determined on a classwide basis only if water service impact can be determined on a classwide basis. It cannot. As Plaintiffs concede, determining water service impact will require a separate trial for each putative class member. App. at 614. The "liability" class certified by the circuit court therefore cannot produce common answers as required to satisfy commonality.

There is no dispute that the existence, type, and extent of water service impact to individuals is not known within the proposed class. The Complaint alleges two different incidents, with different impacts on different customers. Plaintiffs conceded that "individual class plaintiffs may have suffered different consequences from having lost water supply as the result of Defendant's misconduct." App. at 51. Plaintiffs also acknowledged their proposed class may include (and thus WV American could be found "liable" to) individuals who "may have experienced no adverse effects and have no claim for damages." App. at 367. Even for those who were impacted, the type, timing and length of impact varied: some customers experienced "complete interruption of service, others suffered a decrease in pressure, while others experienced a boil water advisory." App. at 51. Testimony from the named plaintiffs highlighted the differences in individual impacts. Whether, and if so how, a class member's water service was actually impacted is undisputedly not demonstrable through aggregate proof.

The record below amply demonstrates the individual nature of the impact inquiry. WV American's expert Jacobson explained the anticipated differences in type, timing and duration of individual impact based on the system hydraulics and factors unique to each customer. Plaintiffs' expert Lorenz acknowledged the hydraulic complexity of WV American's distribution system and did not dispute that determining impact for any customer requires an individualized analysis of factors that include the physical characteristics of a customer's location and the system status as it changed over the course of the event.

Plaintiffs' claim that some class members may have been impacted only through the alleged loss of "adequate water pressure" further demonstrates the need for individualized analysis. Additional provisions within the PSC water rules relied on by Plaintiffs state that a "standard pressure" can be determined for each customer that falls between the minimum and maximum pressure limits, and which "shall be interpreted to permit a different 'standard pressure' calculation for each customer due to varying elevations." W. Va. C.S.R. § 150-7-5.8.a. The rules specifically recognize a range of acceptable pressure fluctuations. *Id.*[7] In addition, some customers waived the pressure requirement by signing pressure waiver agreements acknowledging that WV American "may not be able to furnish adequate water service at the metering point at all times" and agreeing the company will not be "liable or responsible for lack or failure of suitable water pressure or service." App. at 333-34. Thus, there can be no determination of "liability" for a pressure reduction without individual inquiry of the customer's circumstances.

Plaintiffs performed no analysis and provided no classwide evidence of individual impacts. Lorenz's pressure zone map was not intended to and does not constitute classwide evidence of

[7] W. Va. C.S.R. § 150-7-5.8.a specifically provides that (a) "Pressure fluctuations shall not vary more than fifty percent (50%) above nor fifty percent (50%) below such 'standard pressure' during normal operating conditions," and (b) "Pressure variations outside the limits specified will not be considered a violation of this rule if they are infrequent and arise from unusual or extraordinary conditions, or arise from the operation of the customer's equipment."

individual customer impacts. Lorenz only attempted to identify "impacted" pressure zones within the Kanawha Valley system, which he defined as a zone where a tank level or booster station pressure reading within the zone was "out of the ordinary." His map provides no basis for assessing whether individual customers were actually impacted by the "out of ordinary" readings. Thus, the record evidence demonstrates that Plaintiffs cannot prove "liability" under the statute and regulations they relied on without inquiry into individual water service impact that cannot be demonstrated on a classwide basis. This Court can and should vacate the circuit court's class certification order without further remand.

C. The circuit court committed a clear error of law in finding typicality under Rule 23(a)(3).

West Virginia Rule 23(a)(3) requires plaintiffs to demonstrate "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The typicality requirement limits the class members' claims "to those fairly encompassed by the named plaintiffs' claims." *Rezulin*, 214 W. Va. at 68, 585 S.E.2d at 68 (citations omitted). The essence of typicality "is captured by the notion that 'as goes the claim of the named plaintiff, so go the claims of the class.'" *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006) (quoting *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998)). To make a finding of typicality, the court must "describe in specific detail the legal and factual foundations underlying the class." *Swope*, 835 S.E.2d at 131 (reversing circuit court's order finding typicality because it provided only a "general, non-specific" review).

Here, the circuit court addressed typicality in a single paragraph and adopted Plaintiffs' argument (similar to commonality) that WV American's conduct affected the class as a whole so the "low threshold of typicality is satisfied." App. at 5-6; Conclusions of Law ¶4. Any differences in how they were impacted (interruption, low pressure or boil water), if at all, and how long they

were impacted are just "variations" irrelevant to typicality that can be worked out in a later (but unspecified) procedure (under a trial plan to be developed). App. at 364.

Plaintiffs' argument is as wrong under typicality as it is under commonality. The individual inquiry required to determine liability under the statutes and regulations relied upon by Plaintiffs demonstrates that typicality does not exist. Plaintiffs' expert conceded that customers could have substantially different outcomes—a customer might have had no water, reduced pressure or been subject to a boil water advisory, or no effect at all—that would have changed over the course of the event. The significant variation in impacts reflected in the testimony of named plaintiffs further demonstrates these differences. Thus, on the record presented, the circuit court could not determine whether there is a "typical" impact on the class. *See Ways v. Imation Enterprises Corp.*, 214 W. Va. 305, 314, 589 S.E.2d 36, 45 (2003) ("[W]e agree with the circuit court that individualized evidence as to the specific circumstances surrounding the alleged promises is required. Accordingly, we conclude that the circuit court did not abuse its discretion when it ruled that the appellants' breach of contract claims do not meet the commonality and typicality requirements of Rule 23(a)."). The evidence here suggests the opposite—that upon individualized analysis, the proposed class members would have widely disparate impacts from the named plaintiffs. The circuit court failed to address these significant differences in its cursory finding of typicality.

Rezulin does not support the circuit court's finding of typicality. The *Rezulin* plaintiffs sought medical monitoring costs from Rezulin use and also sought damages under the Consumer Protection Act and punitive damages. 214 W. Va. at 59-60, 585 S.E.2d at 59-60. Discussing typicality, the *Rezulin* court noted that the "harm suffered by the named plaintiffs may differ in

degree from that suffered by other members of the class so long as the harm suffered *is of the same type.*" *Id.* at 68, 585 S.E.2d at 68 (emphasis added) (citation omitted). The court concluded:

> [P]laintiffs are asserting that the class is seeking relief related to medical monitoring due to their use of Rezulin. *Thus, because their exposure to Rezulin alone is claimed as the basis for this monitoring, the class and the representatives have nearly identical claims. Additionally, the plaintiffs are alleging that the defendants violated the Consumer Protection Act through conduct directed toward West Virginia as a whole, not toward individual citizens.* We therefore perceive that the claims asserted by the class representatives are typical of those of other class members, and find that the circuit court erred in holding otherwise.

Id. at 68, 585 S.E.2d at 68 (emphasis added). *Rezulin* is distinguishable from this case because the claims there depended only on whether a plaintiff took the drug, and not whether it caused injury or impact.

Here, liability cannot be determined without examination of whether and how class members were impacted. Plaintiffs' claims require determination of the impact on a customer and whether that impact violated the statutes and regulations on which they expressly rely.[8] Thus, the admitted differences in potential impact between the named plaintiffs and other class members do matter and cannot be ignored in the typicality analysis.

D. The circuit court committed a clear error of law when it certified an "issues" class under W. Va. R. Civ. P. 23(c)(4).

1. The circuit court's grant of "issue" certification on liability is a clear legal error and not supported by the factual record.

Plaintiffs cannot demonstrate that Rule 23(a) and (b) requirements for class certification are met for all of the claims and causes of action in their Complaint because of the admitted need to determine individualized issues including at least impact and damages. In Plaintiffs' view,

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[8] *See In re EpiPen ERISA Litigation*, 2020 WL 4501925 at *5 (D. Minn. Aug. 5, 2020) ("As Defendants note, at the motion-to-dismiss stage, Plaintiffs focused on the contracts between the PBMs and ERISA plans as providing support for their claims. Now, Plaintiffs ask the Court to ignore these same contracts, contending that they are irrelevant to determine the threshold questions at issue. But Plaintiffs cannot escape that the PBM/client contracts are the foundation for their claims, and because they vary from client to client, are not amenable to classwide proof.").

however, these concessions are entirely irrelevant to their ability to certify a class. By converting to a narrow liability "issues" class under Rule 23(c)(4), they presume they can chart a path to virtually automatic class certification, with no consideration of the predominance or superiority factors under Rule 23(b)(3). This Court has not yet addressed the application of W. Va. R. Civ. P. 23(c)(4) and its interaction with the other Rule 23 requirements. However, Plaintiffs' position cannot be squared with case law interpreting federal Rule 23(c)(4), which clearly establishes that Rule 23(c)(4) does not create a blanket exception to the other operative constraints in Rule 23, including the predominance and superiority requirements of Rule 23(b)(3). *See, e.g., Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003) (requiring the court to determine for a Rule 23(c)(4) issues class that "the predominance and all other necessary requirements of subsection (a) and (b) of Rule 23 are met"); *Good*, 310 F.R.D. at 296 (stating that "issues" classes can be certified only if otherwise compliant with Rule 23). The circuit court committed clear legal error by granting certification under Rule 23(c)(4) without sufficient analysis and explanation of the relevant factors.

There is no dispute that the requirements embedded in Rule 23(b)(3) are important protections to ensure that the class mechanism is applied only in appropriate circumstances. *See In re Rezulin*, 214 W. Va. at 72, 585 S.E.2d at 72. The precise standard for how to apply Rule 23(b)(3) for an issues class has been subject to differing views in the federal circuits. Some courts have held that all of plaintiffs' claims must satisfy Rules 23(a) and (b) before a court can certify an issues class under Rule 23(c)(4), *see Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir.1996), other courts apply the requirements to each of plaintiffs' claims, *see Gunnells*, 348 F.3d at 441, and others have allowed consideration of more narrow issues, *see Valentino v. Carter-Wallace*, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). But in every instance, a thorough and rigorous

review of predominance and superiority is required. *See Gunnells*, 348 F.3d at 443 (describing how it "scrupulously analyzed" the predominance factor); *Gonzalez v. Corning*, 885 F.3d 186, 202 (3d Cir. 2018) ("[A] court's decision to exercise its discretion under Rule 23(c)(4), like any other certification determination under Rule 23, must be supported by rigorous analysis.") (internal citation and quotation marks omitted).

It is widely recognized that class certification raises the stakes in any litigation and can pressure defendants to consider settlement regardless of the merits of the underlying claims. *See, e.g., CE Design Ltd v King Architectural Metals, Inc*, 637 F3d 721, 723 (7th Cir 2011) (Posner, J.) (noting that "[c]ertification as a class action can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit") (citing 1998 Advisory Committee Notes to Fed. R. Civ. P. 23(f)); *Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) ("Hydraulic pressure ... to settle is now a recognized objection to class certification."). This concern is particularly present here where the class trial would force litigation of, and result in a verdict on, classwide "liability" without examining the actual impact of the event to a single class member. Given these serious policy considerations, a circuit court must present an identifiable, thorough, and clear justification for determining that the requirements of Rule 23(a) and 23(b)(3) have been satisfied and that certification of an "issues" class is appropriate under Rule 23(c)(4).

Here, the circuit court committed clear legal error by not articulating the standard of review it applied in granting certification under West Virginia Rule 23(c)(4). In its Standard of Review discussion, the circuit court states that a court must determine that Plaintiffs have satisfied all of the provisions of Rule 23(a). App. at 3; Standard of Review ¶2. The court then states that "[a]ssuming these elements are met" an action may be brought as a class action with respect to particular issues under Rule 23(c)(4). *Id.* The court does not mention the requirement to satisfy

Rule 23(b)(3). Though the circuit court purports to evaluate the Rule 23(b)(3) factors, it does not identify the standard of review it is applying or specify what "liability issues" it is evaluating for purposes of predominance and superiority. App. at 6-7; Conclusions of Law ¶7 (stating only that "the fault or liability issue predominates over issues affecting only individual members").

Initially, Plaintiffs failed to mention predominance or superiority in their certification memorandum. Given that Rule 23(c)(4) does not supersede these requirements, Plaintiffs failed to sustain their initial burden of proof to demonstrate that class certification should be granted. Their belated attempt to address these issues in their reply, by arguing incorrectly that they did not have to satisfy 23(b) at all, and their limited discussion at oral argument could not cure this failure and resulted in late-arising issues that were not adequately presented to the circuit court with full opportunity for briefing.[9] Thus, the circuit court committed clear legal error by not denying class certification based on Plaintiffs' failure to address these required elements in their motion.[10]

In addition, the circuit court's order does not support its finding that "traditional WVRCP 23(b)(3) requirements are met" in this case. App. at 6-7; Conclusions of Law ¶7. To properly evaluate whether a proposed class satisfies Rule 23, a court must first clearly define the scope of the class so that the required factors can be applied. *See Swope*, 835 S.E.2d at 122. This fundamental threshold requirement for defining the class applies equally to a proposed issues class under Rule 23(c)(4).

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[9] Arguments and evidence cannot be raised for the first time in a reply memorandum. *See Red Barn Motors, Inc. v. NextGear Capital, Inc.*, 2017 WL 5178274, at *1 (S.D. Ind. Mar. 27, 2017) ("[N]ew arguments and evidence may not be raised for the first time in a reply brief. Reply briefs are for replying, not raising new arguments or arguments that could have been advanced in the opening brief.") (internal citations omitted); *James v. Sheahan*, 137 F.3d 1003, 1008 (7th Cir.1998) ("Arguments raised for the first time in a reply brief are waived.").

[10] WV American raised this issue in its Opposition and at oral argument, but the circuit court did not address the objection in its order. App. at 859.

Here, the circuit court failed to clearly identify the classwide "issues" before reviewing the Rule 23(b)(3) factors. Rather than identifying the precise scope of the "issues" to be tried as class, the circuit court declined to make such a determination. *See* App. at 862-63 ("I'm not prepared to . . . certify specific issues today."); *see also* App. at 876 (stating that the court would defer identifying specific questions that would be addressed in class trial). The circuit court's reluctance to define the specific class issues is reflected in its order, which alternately discusses the issues to be certified in terms of "fault" **or** "liability." App. 6; Conclusions of Law ¶6. This ambiguity is not resolved by the court's ultimate ruling, which broadly states that the class will address whether WV American "is liable" for breach of contract and negligence and for actionable statutory violations but does not further define the specific questions or elements the court believes that a class jury will address (or not address). App. at 11; Conclusions of Law ¶15.

This lack of clear analysis demonstrates the circuit's court error in granting certification under Rule 23(c)(4). In practical terms, how thin the court slices the class "issues" and which issues wind up in the class trial versus the subsequent individual trials goes to the heart of the thorough analysis required to assess certification under Rule 23(c)(4). Under the standards applied by certain federal courts, Plaintiffs' concessions regarding their inability to meet Rule 23 requirements across all or some of their causes of action would require denial of class certification. *See, e.g., Castano*, 84 F.3d at 745 (5th Cir.1996). Even under a more lenient view of "issue" certification, the circuit court failed to identify the specific issues proposed for certification and appropriately apply the predominance and superiority factors following that determination.

2. Cases cited by the circuit court do not support class certification.

The circuit court found "compelling the fact that single-event mass accident cases such as this one are considered to be well-suited to class action treatment." App. at 8-9; Conclusions of

Law ¶11. But general citations to distinguishable cases cannot substitute for a thorough application of the Rule 23 requirements to the specific circumstances of this case.

The *Good* court's decision to certify an issues class should not drive the same outcome here. The issues class certified in *Good* would have allowed resolution of complex issues of responsibility and allocation among multiple defendants (including WV American and Eastman Chemical, the chemical manufacturer), plus the issue of the responsibility to be assigned to Freedom Industries, the bankrupt entity that operated the leaking chemical facility. *Good*, 310 F.R.D. at 299. In addition, *Good* did not present individualized issues regarding impact that were relevant to liability because every single customer was subject to the same order not to use their water. The relevant circumstances in this case, including Plaintiffs' allegations that there were at least two events affecting different customers in different ways and the absence of uniform impact across the class, are substantially different than in *Good*.[11] The individual impact review required here undermines any judicial economy associated with an issues class.

The other cases cited by the circuit court and Plaintiffs are distinguishable and dated and do not demonstrate a "consensus" about when certification is appropriate. Importantly, the cases precede recent trends in federal class certification jurisprudence, reflected in cases such as *Wal-Mart v. Dukes* and *Comcast v. Behrend*, and recognized by this Court in *Gaujot*, *Nibert*, and *Swope*, that emphasize the need for courts to enforce the Rule 23 requirements through a rigorous and thorough case-specific analysis. Thus, the cited cases do not compel any particular outcome here.

In *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003), cited by Plaintiffs for the first time at the class certification hearing, homeowners brought a class action against a factory

[11] The circuit court also cited *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005), in its Rule 23(c)(4) discussion. App. at 6; Conclusions of Law ¶6. The *Allstate* court actually vacated the lower court's grant of certification—the discussion points referenced by the circuit court are at best dicta.

owner for damages and injunctive relief, claiming their property values were detrimentally affected by contamination from a leaking storage tank. In affirming the district court's class certification ruling, the Seventh Circuit noted that the "common" issues regarding whether the owner had violated the law and whether the contamination had impacted the clearly defined geographic class area were "not especially complex." *Id.* at 912. All houses in the area were affected, whether by actual contamination or proximity; thus, individualized questions regarding contamination went only to damages. This case is different because the liability and damages issues are intertwined and both require fact-intensive individualized inquiry regarding impact, similar to *Gaujot*. More recent Seventh Circuit decisions have declined to follow *Mejdrech* based on the need, as here, to conduct individual inquiry of impact to determine liability. *See Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086-87 (7th Cir. 2014) (distinguishing *Mejdrech* and reversing class certification order based on "individual issues that will vary from homeowner to homeowner"); *Duffin v. Exelon Corp.*, 2007 WL 845336 (N.D. Ill. Mar. 19, 2007), at *2 (distinguishing *Mejdrech* and rejecting class certification where plaintiffs sought certification of a geographically-based, 6,500 member class without evidence of area-wide contamination).

Other cases cited by the circuit court are similarly distinguishable. The court in *Crutchfield v. Sewerage and Water Board of New Orleans*, 829 F.3d 370 (5th Cir. 2016), actually denied class certification; any statements regarding cases appropriate for certification are merely dicta. In *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988), another chemical contamination case, the court affirmed class certification where "the single major issue distinguishing the class members [was] the nature and amount of damages, if any, that each sustained." *Id.* at 1197; *see also In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 241 F.R.D. 435, 437 (S.D.N.Y. 2007) (noting that courts have typically certified classes when "the

only individual question left to resolve relates to damages"). Again, the individual inquiry required here goes to impact and is an element of liability, not just damages. While the court in *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992), affirmed class certification in a case involving an explosion at an oil refinery, it noted the case was different from other cases where "numerous plaintiffs suffer varying types of injury at different times." *Id.* at 1023.

This case much more closely resembles a series of cases brought against public utilities for full or partial interruptions in service that turn on claims of lack of preparation by the utility, seek damages related to losses and inconvenience from the service outage, and seek class action status for very large groups of customers and other persons. Class certification has been denied in virtually every one of these cases due to individualized negligence, specific causation, and damages issues. *See, e.g., Abbott v. Am. Elec. Power, Inc.*, 2012 WL 3260406, at *4 (S.D.W. Va. Aug. 8, 2012) (denying class certification because individual causation issues and damages claims for loss of food, relocation, and alternative fuels from the outage would require "thousands of individual determinations that will require highly individualized proof of injury and damages").[12]

E. The trial court committed a clear error of law in finding that "the fault or liability issue predominates over issues affecting only individual members."

Rule 23(b)(3) predominance analysis is required here and whether analyzed on a case, claim or issue basis, individual issues predominate over potential common issues and preclude certification under Rule 23(c)(4). W. Va. R. Civ. P. 23(b)(3) provides that certification is proper only when "questions of law or fact common to class members predominate over any questions affecting only individual members." The predominance requirement is similar to but "more

[12] *See, e.g., Von Nessi v. XM Satellite Radio Holdings, Inc.*, 2008 WL 4447115, at *1 n.1 (D.N.J. Sept. 26, 2008); *Bellermann v. Fitchburg Gas & Elec. Light Co.*, 18 N.E.3d 1050, 1060-62, 1065 (Mass. 2014) (class alleging that power company's failure to adequately prepare for winter storms caused prolonged outages not certified because issue of whether company prolonged each plaintiff's outage was an individualized issue).

stringent" than the commonality requirement of Rule 23(a)(2). *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 146 n.4 (4th Cir. 2001). The circuit court committed clear legal error by finding that "the fault or liability issue predominates over issues affecting only individual members" without adequate consideration of the required elements of Plaintiffs' claims and the issues that will remain after a class trial. App. at 7-8; Conclusions of Law ¶9.

Though the circuit court provided no precise definition of the issues to be tried classwide, the court suggests that the class trial would not include "individual inquiries relevant to particular customers." App. at 7-8; Conclusions of Law ¶9. Thus, no ultimate findings can be made regarding the critical liability questions of water service impact and related causation in the class trial. A jury reviewing only WV American's actions cannot finally determine "fault" or breach of duty as asserted by Plaintiffs because of the need to evaluate the actual impact of the June 2015 events on any particular customer to determine whether that impact constitutes a breach of any contractual, statutory or common-law duty owed by WV American to that person or business.

Future juries will still be required to resolve a host of individual issues after the class trial and before a final breach or liability determination could be made, including:

- **Duty**: Whether a customer had a special agreement or contract provision, such as a waiver of pressure requirements, that affects claims for breach or liability; and what basis of recovery may exist for non-customers.

- **Breach/Injury**: Whether there was impact to the individual plaintiff associated with the June 2015 event.
    - What was the nature of that impact (water interruption, variability in water pressure, Precautionary Boil Water Advisory)?
    - What was the duration and timing of the impact?

- **Breach/Injury**: Whether there was an impact to the individual plaintiff that was outside of any specific contractual or other duties owed by WV American, including duties related to maintaining water pressure.
    - What was the customer's normal or standard water pressure?
    - How much did it typically vary under normal circumstances?
    - Did the customer frequently experience significant pressure variations?

- How much did the pressure vary during the June 2015 events?
- Did water user actually follow a Precautionary Boil Water Advisory?

- **Causation:** Whether the alleged failure to implement specific remedial responses that Plaintiffs allege would have protected against impacts of the main break would have actually prevented or mitigated impacts to the individual plaintiff.

These individual issues cannot be brushed aside as related only to damages; they are core questions that must be resolved to determine whether WV American has "liability" to individual class members. Thus, they are inextricably intertwined with any determination of liability and predominate over the issues that would be subject to classwide proof. *Martin v. Mountain State Univ., Inc.*, 2014 WL 1333251, at *6 (S.D.W. Va. Mar. 31, 2014) ("[T]he determination of liability will require an individualized inquiry to determine that the proposed class members were in fact harmed by the loss of accreditation and closing of MSU. These facts will not be susceptible to classwide proof. Consequently, plaintiff has failed to show that common issues will predominate.").

Courts routinely decline to certify liability-based issues classes where, as here, the proposed issues are inseverable from individualized issues, including causation and damages, that must be determined in subsequent proceedings. *See Windham v. American Brands*, 565 F.2d 59, 71 (4th Cir. 1977) ("Whether dealt with in a unitary trial or in a severed trial, the problem of proof of the individual claims and of the essential elements of individual injury and damage will remain and severance could only postpone the difficulty of such proof."); *Gresser v. Wells Fargo Bank, N.A.*, 2014 WL 1320092, at *9 (D. Md. Mar. 31, 2014); *Parkhurst v. D.C. Water & Sewer Auth.*, 2013 WL 1438094 (D.C. Super. Apr. 8, 2013) (denying certification of issues class against a water utility and citing federal circuit court of appeals cases addressing inseverability).

The circuit court also failed to address the undisputed fact that potentially significant numbers of class members as defined were not impacted by the June 2015 events. To justify

certification of a class containing uninjured members, the court must identify a feasible process that allows WV American the opportunity to challenge each class member's proof that the defendant is liable to that class member. *See Wal-Mart Stores*, 564 U.S. at 366-67, 131 S. Ct. 2560-61. Plaintiffs cannot simply presume such injury or defer such individualized proof until an undetermined future stage. *See In re Asacol Antitrust Litigation*, 907 F.3d 42, 55 (1st Cir. 2019) (evaluating proof of injury under predominance requirement in context of denying class action certification); *In re Rail Freight Fuel Surcharge Antitrust*, 725 F.3d 244, 252 (D.C. Cir. 2013) (vacating certification of a class for lack of predominance because plaintiffs failed to "show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy"). The circuit court's order provides no discussion of how it will ensure those rights are protected. Under the circumstances presented in the record, the circuit committed clear legal error in finding that the predominance requirement was satisfied.

F. The trial court committed a clear error of law in finding that a class action is "clearly superior" to other methods of adjudication.

West Virginia Rule 23(b)(3) requires a court to evaluate and determine whether a class action is superior to all other methods for the fair and efficient adjudication of the controversy. *See Lienhart*, 255 F.3d at 147. This requirement is not diminished by Rule 23(c)(4). Instead, superiority takes on enhanced importance in evaluating proposed "issues" classes. *See Parker v. Asbestos Processing, LLC*, 2015 WL 127930, at *15 (D.S.C. Jan. 8, 2015) ("As the common issues are narrowed down to make them sufficiently 'common,' the desirability of issue certification is diminished because . . . the relatively simple threshold issues can quickly be disposed of in individual trials. This means that the superiority component of Rule 23(b)(3) frequently comes into play to defeat class certification."). The circuit court's finding that Plaintiffs satisfied the superiority requirement is not supported by the record below.

Judicial efficiency is a key touchstone for superiority—the question for the court is whether investing the resources in the class trial of limited issues will increase the efficiency of the overall litigation. Where the court and the parties will still face individual trials for all class members on multiple claim elements, a narrow "issues" class certification is not the superior management tool. *See In re Atlas Roofing Corp. Chalet Shingle Prods. Liab. Litig. v. Atlas Roofing Corp.*, 321 F.R.D. 430, 447 (2017) ("[C]ertifying an issues class would not promote judicial efficiency. Plaintiffs' case for [Rule 23(c)(4)] certification collapses when it confronts the fact that certification of a common issues class *will not dispose of a single case or eliminate the need for a single trial.*") (quoting *In re Con Agra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 701 (N.D. Ga. 2008)) (emphasis added); *Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc.*, 254 F.R.D. 68, 77 (E.D.N.C. 2008) (rejecting certification of an "issues" class where a "multiplicity of individual causation and affirmative defense issues" would remain).

The circuit court's cursory statement that a class action is "clearly superior to other methods of adjudication," App. at 7; Conclusions of Law ¶8, is not consistent with the limited extent to which resolution of Plaintiffs' "liability" issues will materially advance the litigation or promote judicial economy. Liability will not be fully determined following the class trial because to complete an actual liability determination here, a jury will have to assess on an individual basis whether each Plaintiff is a class member, suffered any impact or injury and whether that impact or injury constitutes a breach of contract or other applicable standards established by the relevant provisions (as discussed above). This individual liability analysis is in addition to, and intertwined with, the individual causation and damages determinations that Plaintiffs concede also would need to be made in individual trials for each putative class member. Courts routinely deny certification of Rule 23(c)(4) classes in similar circumstances. *See, e.g., D.C. by & through Garter v. Cty. of*

San Diego, 783 F. App'x 766, 767 (9th Cir. 2019) (noting that issue certification under Rule 23(c)(4) is appropriate "only if" adjudicating the certified issues would significantly advance judicial economy and efficiency); *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (issue certification would not "materially advance the litigation because it would not dispose of larger issues such as reliance, injury, and damages"); *Dungan v. Academy at Ivy Ridge*, 344 Fed. App'x. 645, 648 (2d Cir. 2009) (upholding denial of certification of common issues because it would not "meaningfully reduce the range of issues in dispute and promote judicial economy."); *Parker*, 2015 WL 127930, at *16 (summarizing list of cases denying issue class certification on superiority grounds).[13]

The circuit court also failed to address, and Plaintiffs failed to demonstrate, how a class action compares favorably to other potential methods for adjudication of this case. *See Atlas Roofing*, 321 F.R.D. at 446 (stating that the focus in the superiority evaluation "should be on the relative advantages of a class action suit over whether whatever other forms of litigation might be realistically available to the plaintiffs"). By Plaintiffs' own admission, the full resolution of their asserted class issues will not eliminate the requirement for an individual trial for any of the class members in this case (which Plaintiffs assert may number over 100,000). *See* App. at 630 (Plaintiffs' Counsel stating that "the administrative or mini trials on compensatory damages...would take three to four hours for a person to put on at most..."). These manageability problems are compounded by the circuit court's failure to clearly define the issues that it expects

[13] Plaintiffs' only effort to rebut the multiple cases cited by WV American that denied certification of a Rule 23(c)(4) issues class was to suggest that the initial phase of trial in those cases would not "actually fully determine liability." App. at 361. Rather than distinguishing those cases, Plaintiffs' description fits this case exactly—liability cannot be fully determined without evaluating individual impact. The circuit court did not address any of the cases identified by WV American in its order and cited only to *In re Serzone Prod. Liab. Litig.*, 231 F.R.D. 221, 246 (S.D.W. Va. 2005), which involved certification of a class in the context of a final settlement rather than a continuing litigation with associated manageability issues.

to include in a class trial and the absence of any consideration or discussion of how remaining issues would be handled outside of the class. Other viable management options exist if the class members were to bring claims individually, including consolidation, bellwether trials and other techniques common for mass torts. *See, e.g., Naparala v. Pella Corporation,* 2016 WL 3125473, at *14 (D.S.C. June 3, 2016) (discussing management tools as potential alternatives to class certification).[14] By failing to consider these options and compare them to class certification, the circuit court committed clear legal error.

The circuit court cites to the relatively low value of potential individual claims as a "compelling" rationale for preferring the class device. While such claims may be a factor in weighing class certification, a court must still perform a rigorous superiority analysis under the specific circumstances presented in this case. *See, e.g., Naparala,* 2016 WL 3125473, at *14 (distinguishing *Good* and stating that "this incentive problem is not solved by issue certification where the remaining individualized issues will also require significant resources . . . [E]ven if it is true that the defect issue makes this litigation prohibitively expensive for many class members, that fact alone is insufficient to justify class certification."); *In re Asacol,* 907 F.3d at 56 (noting that Rule 23 serves as an important tool to address the problem of conduct that inflicts small amount of damage on large numbers of people, "[b]ut that fact grants us no license to create a Rule 23(b)(3) class in every negative value case by either altering or reallocating substantive claims or departing from the rules of evidence").

G. The circuit court committed a clear error of law by defining a class that is inconsistent with the court's justification for the class and not ascertainable.

[14] Referral to the West Virginia Mass Litigation Panel is also an option if class is not certified and a significant number of individual plaintiffs decide to bring their own claims; the Mass Litigation Panel has a long history of managing broad and complex mass tort actions effectively and efficiently (including the state filed cases arising after the January 2014 Freedom Chemical Spill). Mass Litigation Panel website, Water Contamination Litigation, http://www.courtswv.gov/lower-courts/mlp/water-contamination.html.

"It is imperative that the class be identified with sufficient specificity so that it is administratively feasible for the court to ascertain whether a particular individual is a member." Syl. Pt. 3, *State ex rel. Metro. Life Ins. Co. v. Starcher*, 196 W. Va. 519, 474 S.E.2d 186 (1996); *see* Louis J. Palmer, Jr., & Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure* at 617-18 (5th ed. 2017) ("WV Litigation Handbook") ("Before a court may certify a class pursuant to Rule 23, the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class."). The ascertainability inquiry is two-fold, requiring a showing that: (1) the class is defined with "reference to objective criteria;" and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. *See EQT Production Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). The circuit court committed clear legal error by failing to define an ascertainable class.

The initial flaw with the circuit court's class definition is that it covers a broader group of class members than the class described by the court in its evaluation of ascertainability requirements. The circuit court stated that "Plaintiffs have requested that the Court certify a Class of *WVAW customers* objectively defined as located within the geographical boundaries of the WVAW service area served by the 36-inch water main that broke." App. at 8; Conclusions of Law ¶10 (emphasis added). Then, in support of its ascertainability finding, the court states that WV American can "identify the addresses *of its own customers* within objective boundaries so that notice can be readily provided to the Class." *Id.* By contrast, the actual class definition specified by the court goes beyond just WVAW customers: "The Class is defined as all *WVAW customers, residents and businesses* located within the boundaries of the service area served by the 36-inch

water main that broke." App. at 10; Conclusions of Law ¶14. This disconnect in the circuit court's evaluation demonstrates the absence of a thorough analysis fatal to the certified class.

First, the circuit court does not make a determination that non-customer "residents and businesses" are ascertainable under the applicable standards. Ascertainability applies across the class, and failure to identify a segment of that class, even if other segments are properly identified, is fatal to certification. *See EQT Production*, 764 F.3d at 359 (vacating lower court's grant of certification where, although some members would be "easy to identify," determining others would require a "complicated and individualized process").

Second, the circuit court and Plaintiffs fail to provide any explanation of an administratively feasible way to identify and provide notice to the amorphous group of non-customers included in the final class definition. While the court suggested that WV American's customers could be noticed through WV American's business records, it provided no explanation of an administratively feasible way to identify these "other households and businesses," who would not be included in any WV American records. The identification problem is further complicated by the passage of time, as any information regarding identification of prior renters becomes less reliable more than five years after the events. Ready identification of class members for purposes of protecting their rights to due process through notice and participation is a core principle of class action litigation. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (finding that Due Process requires that absent class members receive notice of litigation and the opportunity to participate in or opt out of litigation). The court erred by certifying a class without an administratively feasible way to determine "the nature of the proposed classes who may be bound by a potential merits ruling." *EQT Production*, 764 F.3d at 358.

The "water service boundary map" prepared by Plaintiffs' expert Lorenz does not provide a reliable method for identifying impacted individuals. Lorenz described his review as looking only at potential impacts on overall pressure zones, not at whether individual customer locations within those zones were actually impacted. He never stated that he could, or was even trying to, connect his boundaries to those areas directly served "by the 36-inch water main that broke" as referenced in the class definition adopted by the circuit court. These concessions contradict the circuit court's reliance on Lorenz's map as an "objective demonstration" regarding the class definition that is required to certify a class. *See EQT Production,* 764 F.3d at 358.

H. If the circuit court's order is not reversed, this Court should remand with instructions for detailed findings.

The circuit court committed clear legal error and this Court may reverse and vacate the class certification order without need for additional review by the circuit court. However, if this Court does not finally reverse the circuit court's order, it should, at a minimum, remand the case to the circuit court with instructions to perform the thorough analysis required by *Rezulin, Gaujot* and *Swope*, and support its holdings with detailed findings. As Justice Armstead stated in *Swope*, 835 S.E.2d at 122 (citing *West Virginia Litigation Handbook,* § 23, at 617-18):

> An order that certifies a class action must define the class and class claims, issues, or defenses. Specifically, the text of the order or an incorporated opinion must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis. Clearly delineating the contours of the class along with the issues, claims, and defenses to be given class treatment serves several important purposes, such as providing the parties with clarity and assisting class members in understanding their rights and making informed opt-out decisions.

The circuit court's order fails to satisfy these requirements. For example, the circuit court devoted just one paragraph to its commonality evaluation under Rule 23(a)(2) without even mentioning this Court's recent decision in *Gaujot*. In direct contradiction to the guidance in

Gaujot, the circuit court made no detailed evaluation of the underlying statutes and regulations to determine the elements of liability and no review of the related merits issues regarding the assessment of individual impacts to class members. The court's review of other requirements, including typicality, predominance, superiority, and ascertainability is similarly general and fails to address facts and legal precedents presented by WV American.

In addition, the circuit court's order provides only a cursory description of its application of West Virginia Rule 23(c)(4) to certify an "issues" class. The circuit court did not clearly define the standard it was applying, or the "issues" that it was considering, in assessing whether the issues class satisfied Rule 23(a) and (b) requirements. The court also failed to address how it would manage future phases of the litigation and ensure protection of the rights of class members and WV American. These failures are sufficient to support a full reversal of the circuit court's order, but at a minimum the order, if not reversed entirely, should be remanded with instructions to the circuit court to carefully consider these issues and to address them in a rigorous way in the order.

VI. CONCLUSION

The circuit court exceeded its legitimate powers and committed clear errors of law in the July 14, 2020, Order by granting certification of an issues class under Rule 23(c)(4) that does not satisfy the requirements of Rule 23(a) and (b)(3) under West Virginia law as applied by this Court. Accordingly, WV American requests that this Court issue a rule to show cause why a Writ of Prohibition should not be issued and expeditiously order an automatic stay pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure. After an opportunity respond and for oral argument, a Writ should be issued prohibiting the Honorable Carrie L. Webster, Judge of the Circuit Court of Kanawha County, from conducting any further proceedings in this class action and the July 14, 2020 Order granting the Plaintiffs Motion for Class Certification should be vacated.

Dated: August 31, 2020

Respectfully submitted,

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VERIFICATION

I, Thomas J. Hurney, Jr., counsel for the Petitioner West Virginia-American Water Company, verify that the factual and legal arguments discussed herein are accurate and true to the best of my belief.

Thomas J. Hurney, Jr.
(WV State Bar # 4353)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

STATE OF WEST VIRGINIA *ex rel.* WEST VIRGINIA-AMERICAN WATER COMPANY,

Petitioner,

v.

THE HONORABLE CARRIE L. WEBSTER, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, PRESIDING JUDGE; RICHARD JEFFRIES, individually and on behalf of all others similarly situated; and COLOURS BEAUTY SALON, LLC,

Respondents.

CERTIFICATE OF SERVICE

I, Thomas J. Hurney, Jr., hereby certify that service of the foregoing **VERIFIED PETITION FOR WRIT OF PROHIBITION** was had by sending a true and exact copy of the same via electronic mail to the following counsel of record this 31st day of August 2020:

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