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.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

1. Whether the circuit court committed clear legal error in finding for purposes of class certification that WV American can be liable for breach of contract, common law negligence, and for violating W. Va. Code § 24-3-1 without any showing that the putative class members' water service was impacted and, if so, whether the extent of the impact was such that WV American failed to provide reasonable water service?

2. Whether the circuit court committed clear legal error in finding commonality under W. Va. R. Civ. P. 23(a)(2) where liability under the statute and regulations upon which Plaintiffs base their claims cannot be determined without consideration of individual water service impact, which the circuit court found cannot be determined on a classwide basis?

3. Whether the circuit court committed clear legal error 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?

4. Whether the circuit court committed clear legal error when it certified a liability "issues" class under W. Va. R. Civ. P. 23(c)(4) and failed to require Plaintiffs to demonstrate satisfaction of predominance and superiority under W. Va. R. Civ. P. 23(b)(3) for the action as a whole or for any one single cause of action?

5. Related to the circuit court's certification of a class under W. Va. R. Civ. P. 23(c)(4):

a. whether the circuit court committed clear legal error in finding that common issues predominate under W. Va. R. Civ. P. 23(b)(3) by misstating the elements of Plaintiffs' claims and without properly identifying and weighing all of the individualized issues related to water service impact and reasonable service that are inextricably intertwined with any determination of liability?

b. whether the circuit court committed clear legal error in finding superiority under W. Va.

R. Civ. P. 23(b)(3) when resolution of the liability issues certified will not resolve the issues of breach or liability or eliminate the need for complex individual trials for each class member?

6. Whether the circuit court committed clear legal error in defining a class and finding ascertainability based on a map from Plaintiffs' expert that was not prepared for the purpose of identifying and does not identify the "areas served by the 36-inch pipe that broke"?

II. STATEMENT OF THE CASE

The answer to each of the above questions is "yes." This Court should issue the requested Writ because the circuit court (1) committed clear legal error by misinterpreting the showing required to establish the statutory and regulatory liability elements underlying Plaintiffs' claims and (2) exceeded its legitimate powers by granting class certification under W. Va. R. Civ. P. 23(c)(4) in reliance on that erroneous interpretation and without evidence sufficient to demonstrate satisfaction of the requirements of Rule 23(a) and 23(b)(3).

A. Background and Procedural History

1. The June 2015 Water Main Break Events

WV American owns and operates the Kanawha Valley Treatment Plant in Charleston, West Virginia, and the associated Kanawha Valley Distribution System ("KV System") that provides potable water to more than 90,000 customer connections across nine West Virginia counties. WV American is regulated by the Public Service Commission ("PSC") of West Virginia and conducts its operations pursuant to a regulatory compact with the PSC—WV American is granted the exclusive right to provide water service within its system and in return the rates it can charge to customers must be approved by the PSC. *See In re W. Va.-Am. Water Co.*, Case No. 08-0900-W-42T, 2009 WL 1587996 (W. Va. P.S.C. Mar. 25, 2009) ("The Commission is charged by statute with allowing the lowest reasonable rates for utility service."). These rates and the service obligations of WV American are set forth in a tariff approved by the PSC that defines WV

American's relationship with its customers.

As pled in the Complaint, Plaintiffs' claims arise from two leaks on a 36-inch transmission main located in Dunbar, West Virginia, in the western portion of the KV System (the "June 2015 events"). Plaintiffs claim the initial leak occurred on June 23, 2015, causing "outages and inadequate water pressure to approximately 25,000 WVAW customers," and was repaired, with water service restored on June 27, 2015. App. at 20; Compl. ¶¶8–9. On June 29, 2015, "another problem developed at the site of the initial break, which [caused] an additional interruption in service," but this leak impacted fewer customers and was repaired, with full water service with adequate pressure restored no later than July 1, 2015. App. at 20; Compl. ¶¶10–11. Plaintiffs claim some customers "experienced a complete interruption of service, others suffered a decrease in pressure, while others experienced a boil water advisory" from these events. App. at 52.

2. Class Action Complaint for Violation of Statute and Regulations

On June 2, 2017, Plaintiffs filed a class action Complaint in the Circuit Court of Kanawha County asserting four claims arising from the June 2015 events. App. at 16–32. Count I ("Breach of Contract—Duty to Supply Water") alleged WV American breached its customer contracts "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" in violation of W. Va. C.S.R. § 150-7-4.1.e.4.[1] App. at 22–23; Compl. ¶¶23, 24. Count II ("Breach of Contract—Duty to Maintain Facilities to Provide Adequate and Continuous Service") alleged WV American breached its customer contracts by failing to maintain its plant and system in such condition to furnish safe, adequate and continuous

[1] This provision stated: "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." Effective September 14, 2021, the Rules for the Government of Water Utilities were redesignated, and this regulation was moved to C.S.R. § 150-7-6.1.5.d. In this Petition, WV American will cite to the 2011 version that was in effect during the relevant time period.

service in violation of C.S.R. § 150-7-5.1.a (2011).[2] App. at 23; Compl. ¶28.

Count III ("Violation of Statutory Obligations") alleged WV American violated W. Va. Code § 24-3-1: "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. Plaintiffs alleged WV American violated § 24-3-1 because "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. Count IV ("Negligence") alleged WV American failed to exercise reasonable care through conduct that violated W. Va. C.S.R. § 150-7-5.1.a, the same provision relied upon for their claim in Count II. App. at 27; Compl. ¶52.

Plaintiffs initially defined 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; Compl. ¶56. Plaintiffs seek compensatory damages for all claims, "including but not limited to damages for annoyance and inconvenience, out-of-pocket expenses associated with obtaining substitutes, and loss of profits," App. at 23, 25, 26, 27; Compl. ¶¶26, 34, 46, 53, and sought punitive damages in Counts III and IV. App. at 26, 28; Compl. ¶¶47, 54.

3. Original Class Certification Proceedings

On February 6, 2020, Plaintiffs moved to certify an "issues" class under Rule 23(c)(4) to determine WV American's "liability" under the statutory and regulatory provisions cited in the Complaint. App. at 44. Plaintiffs also sought to have the same jury address punitive damages and assign a "multiplier" to be used in ultimately calculating punitive damages awards. App. at 50,

[2] The current version of this provision is found at C.S.R. § 150-7-7.1.1.

368–69. Plaintiffs abandoned the Complaint's original allegation that WV American violated regulatory and statutory provisions *based on the existence and extent of water service interruption*. Instead, Plaintiffs changed course and redefined the scope of their claims, arguing that liability was based "entirely" on WV American's actions *before* the June 23, 2015, main break without any consideration of water service impact. App. at 365. Under Plaintiffs' new theory of liability, they explained, "[i]t 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." App. at 533–34; *see also* App. at 538 ("Certainly what happened to any individual customer doesn't matter for purposes of this liability determination.").

Plaintiffs asserted that all water service impacts related exclusively to damages and were to be dealt with in later trial "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' Trial Plan proposed that a classwide "Phase I" trial would first determine "liability" based on WV American's pre-break actions or omissions and a punitive damages multiplier. App. at 630. Then, the Court could hold short, individual "Phase II" trials of three to four hours for each class member to determine damages, if any. App. at 614, 630. Plaintiffs also provided a new class definition that eliminated the explicit reference to water service impact, instead defining the class "by reference to the boundaries of the WVAW service area served by the 36-inch water main that broke." App. at 372.

WV American opposed certification and argued that the question of "liability" was not appropriate for class resolution because determining liability under each of Plaintiffs' causes of action requires examination of how water service was impacted, which can only be determined

through individualized inquiry. App. at 111, 123. WV American also opposed certification because Plaintiffs failed to demonstrate commonality or typicality under Rule 23(a), failed to address or demonstrate predominance and superiority under Rule 23(b)(3) in their memorandum and failed to identify an ascertainable class. App. at 126, 128, 135. WV American also opposed the punitive damage "multiplier" request. App. at 140.

On July 14, 2020, the Court granted Plaintiffs' Motion for Class Certification, except for the request to certify a punitive damages multiplier, and entered an order containing Findings of Fact and Conclusions of Law. App. at 1–12.

4. Prior Writ Petition and Remand Proceedings

WV American filed a Petition for Writ of Prohibition against the certification order on August 31, 2020. App. at 1512. On November 20, 2020, this Court issued *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748 (2020) ("*Surnaik I*"). Then, after Plaintiffs responded (and WV American replied), this Court issued a Rule to Show Cause on December 3, 2020, and scheduled oral argument under Appellate Rule 20 for February 10, 2021. App. at 1616. Plaintiffs then moved to remand this case for further consideration based on *Surnaik I*. App. at 1619. On January 28, 2021, this Court granted Plaintiffs' motion and ordered remand. App. at 1634. Thus, this Court has never considered WV American's objections to certification.

On remand, after pursuing no further discovery, Plaintiffs again sought class certification. App. at 1640. In opposition, WV American again argued that under the thorough analysis required by *Surnaik I*, certification should be denied because water service impact—as admitted by Plaintiffs—cannot be determined on a classwide basis. App. at 1663. As a result, the proposed "issues" class could not resolve liability because Plaintiffs expressly rely on a statute and regulation which by their terms require consideration of impact to determine a violation. App. at 1660, 1669. In their Reply, Plaintiffs changed course (again). They announced for the first time

that they had abandoned Count I of the Complaint (after acknowledging WV American's argument that the breach of duty element requires demonstration of individual impact is correct for Count I). App. at 1735. Plaintiffs also asserted new arguments about the issuance of Boil Water Advisories that directly contradicted their prior admissions. App. at 1734–75. WV American's Motion for Leave to File a Surreply to respond to these new arguments, App. at 1760, was summarily denied by the circuit court. App. at 1784.

On July 5, 2022, the circuit court granted class certification under Rule 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 2167. The class includes "all WV American customers, residents and businesses located within the boundaries of the service area by the 36-inch water main that broke." *Id.* The circuit court adopted Plaintiffs' argument that liability turns solely on the pre-break condition of WV American's system, *id.*, and found that whether and to what extent a customer's water service was impacted was an individualized issue not appropriate for class treatment. App. at 2147 ("It is true, as WV American urges, that potential differences exist in the degree of service interruption experienced from one class members to the next."). However, the circuit court held that consideration of service impact was relevant only to damages because WV American's liability "does not in any way turn on . . . the impact and the extent of the service interruption for any individual customer," turning instead "on what WV American knew or should have known . . . not the actual extent of the service interruption to any individual consumer." App. at 2154, 2155.

5. Record Evidence Showing No Common Proof of Water Service Impact

Evidence contained in the record below regarding the determination of potential individual impacts associated with the June 2015 events is critically important to understanding why the circuit court committed clear legal error when it determined Plaintiffs satisfied the Rule 23(a) and

(b)(3) requirements for class certification. Both parties presented expert testimony, and, in conjunction with admissions by Plaintiffs, the circuit court expressly acknowledged the individualized nature of water service impacts.

Plaintiffs admit that "individual class plaintiffs may have suffered different consequences from having lost water supply as the result of Defendant's misconduct." App. at 52. Some customers experienced "complete interruption of service, others suffered a decrease in pressure, while others experienced a boil water advisory." *Id.* Plaintiffs have acknowledged and explained why the precautionary boil water advisories only applied to customers who experienced a water service impact.[3] App. at 630 (describing "evidence of [] the number of people that were called by West Virginia-American's automated system and told, **if** you have low pressure, boil your water"); *id*. at 633 (noting that "the advisory that went out here was boil water **if** you lose pressure"). Plaintiffs further acknowledged that the 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.

The reasons for these differences in impact are demonstrated in the record below. The KV System is geographically large and hydraulically complex under normal operating scenarios. App. at 247; *see also W. Va.-Am. Water Co*., Case No. 15-0675-s-42T, 2016 WL 792366 (W. Va. P.S.C. Feb. 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 dispersed with difficult terrain). Plaintiffs' engineering expert Wayne Lorenz admitted this, and

[3] 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. at 484–86.

further agreed that the system's complexity increased during the June 2015 events and subsequent repairs due to unusual system hydraulics and WV American's actions to route water to areas that were isolated for repairs. App. at 244–47. WV American's engineering expert Michael Jacobson explained that due to the complexity of the system, the effect of the June 2015 events on customers would have been variable as to type, duration, and time. App. at 275–76. Lorenz agreed, conceding that determining impact for any customer requires an individualized analysis of factors and would have to evaluate changing impacts at each customer location over the course of the June 2015 events. App. at 242–43.

Plaintiffs' own testimony demonstrates that customers had widely different experiences in terms of service impact. Although Plaintiffs claimed the break caused "an outage impacting 25,000 customers for at least three days," App. at 25; Compl. ¶38, Plaintiff Jeffries, the residential customer representative, could only say that for part of one day, he had "very little" water, meaning low pressure, at his home. App. at 157. He had a similar experience at work where his employer continued to operate. App. at 158. His sister in Red House had water "the whole time," and his son-in-law in Rock Branch had water but "no high water pressure like normal." App. at 159, 162. Carolyn Burdette, sole owner of Plaintiff Colours Beauty Salon, LLC, testified that she could not definitely say how long the salon was out of water as she did not keep records,[4] and "I can't remember exact dates," but that it was "probably five or six days." App. at 200–01, 214.

Plaintiffs proposed that a map created by their expert Lorenz would identify the geographic boundaries of their proposed class. App. at 498. But Lorenz's map only depicts pressure zones in the KV System he claims were "impacted" or "likely impacted" due to the June 2015 events, App.

[4] Plaintiffs assert Burdette received an "order" from the West Virginia Board of Barbers and Cosmetologists "to shut her business down," which "was not lifted for approximately six to eight days," App. at 54, but Plaintiffs have never produced a written order.

at 243, 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 did not analyze causation or whether individual customers within the map were actually impacted by the "out of the ordinary" readings. App. at 247–50. When asked if he had done an analysis to assess individual customer impacts, Lorenz responded: "No. I 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. And Plaintiffs' expert Seward Gilbert merely estimated the number of residents and businesses within Lorenz's "impacted" areas using census block information, so Gilbert's opinions also cannot be used to identify impacted customers. App. at 322–32.

III. SUMMARY OF ARGUMENT

The circuit court's decision to certify a "liability" class under Rule 23(c)(4) focused solely on actions before the 2015 leak events improperly subjects WV American to the risk of a classwide liability finding for tens of thousands of customers (1) without any common proof of actual water service impact and (2) without a demonstration that WV American failed to provide reasonable service to any of those customers. The circuit court's hybrid approach effectively allows automatic certification against regulated public utilities without rigorous application of the critical class safeguards in Rule 23(a) and (b)(3). The circuit court committed multiple clear errors of law, and its order certifying this class should be reversed through issuance of the requested Writ.

As a threshold matter, the circuit court committed clear error by misconstruing the applicable statutory and regulatory provisions on which Plaintiffs base their claims. Under those provisions, WV American's "liability" for failure to provide reasonable service cannot be determined without consideration of how, when, and for how long a customer's service is impacted. Unlike the facts presented in *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 875

S.E.2d 179, 180 (W. Va. 2022) ("*Surnaik II*"), where the circuit court and this Court found common proof of classwide impact, Plaintiffs here do not dispute, and the circuit court confirmed, that the impact assessment *is not* capable of common proof and requires subsequent individualized inquiry for each potential class member. However, the circuit court here incorrectly cabined customer impact as relevant only to damages, not liability. This fundamental error then permeated the court's analysis of the Rule 23 factors and resulted in a clearly erroneous certification determination.

First, the circuit court erred in finding that Plaintiffs satisfied Rule 23(a). Commonality is not "easily met in this case" under this Court's guidance when the *question* of liability for Plaintiffs' claims—the issue the circuit court singled out for classwide resolution—does not provide a *common answer*. The liability question cannot be answered without examining the water service impact and deciding whether it constitutes reasonable service; these issues cannot be determined through common proof. The circuit court's typicality analysis also failed to consider the connection between individual impact and liability under Plaintiffs' claims and ignored significant differences in impact between the named Plaintiffs and the putative class.

Second, the circuit court incorrectly relied on Rule 23(c)(4) to certify a "liability" issues class. Rule 23(c)(4) is a procedural mechanism that does not provide an independent basis for certification of a liability issues class where, as here, Plaintiffs concede that their overall or individual claims could not have been certified under Rule 23(b)(3). The circuit court's evaluation was flawed because it relies on the incorrect determination that liability can be determined without consideration of individual customer service impact. As a result, the circuit court incorrectly identified and weighed common versus individual issues and substantially understated the complex trial issues associated with determining the extent of any water service impact and whether the

impact resulted in less than reasonable service. Under an appropriate analysis, individual issues predominate over common issues. The circuit court also committed a clear error of law by finding that its certified "issues" class was "clearly superior" to other case management approaches. The certified "liability" class will not finally resolve breach or liability for a single class member because assessment of impact is necessary to any finding of liability. Courts regularly find class actions are not superior and deny class certification under Rule 23(c)(4) where it will not materially advance the litigation.

Third, the court's determination that the class definition could be objectively defined and that class members are ascertainable based on a map created by Plaintiffs' expert is not supported by the record. Any of these clear errors are sufficient to compel issuance of the requested Writ.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument will aid the decisional process and should be granted under W. Va. R. App. P. 20, as this Court previously recognized.[5] Certification of an "issues" class against a regulated utility under provisions providing for reasonable service, without consideration of actual customer impact, presents an issue of fundamental public importance to water companies, public service districts, and other utilities in West Virginia. Under the circuit court's ruling, a utility can be subject to class treatment of liability issues without any classwide evidence of service impacts. This case also provides an opportunity for the Court to issue guidance regarding the uses and limitations of W. Va. R. Civ. P. 23(c)(4), an issue of first impression in West Virginia.

V. ARGUMENT

A. Issuance of a Writ of Prohibition Is Appropriate Under the *Hoover* Factors.

[5] This Court granted Rule 20 argument following briefing on WV American's prior Writ Petition, *see* App. at 1616, but remanded the matter before argument. App. at 1634.

Under W. Va. Code § 53-1-1, "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." *See also* Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). While the Court traditionally weighs five factors in evaluating whether to issue a Writ of Prohibition under *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996), it has repeatedly recognized that "[w]rits of prohibition offer a procedure . . . preferable to an appeal for challenging an improvident award of class standing." *McFoy v. Amerigas, Inc.*, 170 W. Va. 526, 532, 295 S.E.2d 16, 22 (1982); *State ex rel. Mun. Water Works v. Swope*, 242 W. Va. 258, 264, 835 S.E.2d 122, 127 (2019). Weighing the *Hoover* factors here demonstrates that a Writ should issue.

The first two *Hoover* factors relate to the immediate need for appellate relief: (1) whether the party seeking the writ has no other adequate means to obtain the desired relief; and (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal. An appeal is deemed inadequate, and prohibition warranted, when "both parties would be compelled to go through an expensive, complex trial and appeal from a final judgment, and we determine there is a high likelihood of reversal on appeal. The unreasonableness of the delay and expense is apparent." *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 658, 510 S.E.2d 486, 492 (1998). Under the circuit court's certification order, WV American will be forced to litigate against an improperly certified class with no opportunity for appellate review until after trial. A delayed appeal is particularly inadequate here because certification raises the stakes in any litigation and can pressure defendants to consider settlement, regardless of the merits of the underlying claims. *See McFoy*, 170 W. Va. at 532, 295 S.E.2d at 23; *see also CE Design Ltd v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011) ("Certification as a class action can coerce a defendant into

settling on highly disadvantageous terms regardless of the merits of the suit.").

The third *Hoover* factor—whether the lower court's order is clearly erroneous as a matter of law—is given substantial weight. A circuit court "commits clear legal error when it incorrectly chooses, interprets, or applies the law." *State ex rel. W. Va. Reg'l Jail Auth. v. Webster*, 242 W. Va. 543, 551, 836 S.E.2d 510, 518 (2019) (citation omitted). Here, the circuit court misinterpreted the applicable regulatory and statutory provisions underlying Plaintiffs' claims to find that WV American's "liability" can be determined in a class trial without any consideration of whether and to what extent a customer's water service was impacted, and then relied on that erroneous interpretation in applying the Rule 23 factors.

The remaining two factors are also satisfied. Whether the circuit court's order is an oft repeated error or manifests persistent disregard for procedural or substantive law is demonstrated by the court again certifying the class after remand and, as WV American urges, disregarding recent precedent. The circuit court's order also raises new and important issues of law of first impression related to class certification under Rule 23(c)(4). A Writ of Prohibition should issue.

B. The Circuit Court Committed Clear Legal Error When It Found WV American Can Be Held Liable Without Consideration of Whether and to What Extent a Customer's Water Service Was Impacted.

Plaintiffs' remaining claims—breach of contract (Count II), violation of statute (Count III), and negligence (Count IV)—are all expressly based on C.S.R. § 150-7-5.1.a. and W. Va. Code § 24-3-1. Plaintiffs allege that WV American breached its customer contracts by violating § 150-7-5.1.a, and their negligence claim is also premised on this same alleged violation. App. at 23, 27. Plaintiffs' claim for statutory violation is premised on § 24-3-1. App. at 25. For purposes of evaluating class certification, the circuit court found that the liability analysis for all three causes of action was the same. App. at 2146.

The circuit court found that WV American's liability to its customers under § 150-7-5.1.a.

and § 24-3-1 can be determined without any showing as to whether and to what extent a customer's water supply was impacted. *Id*. Although the circuit court found that the degree of service impact varied from one customer to the next, the court held this was not relevant to liability. App. at 2154 (finding that WV American's liability "does not in any way turn on . . . the impact and extent of the service interruption for any individual customer"). This clearly erroneous legal conclusion then permeated and was the basis for the circuit court's class certification ruling.

This Court has recognized "[m]erits questions may be considered to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Syl. Pt. 7, *State ex rel. W. Va. Univ. Hosp., Inc. v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (2019) ("*Gaujot II*"). And "[w]hen consideration of questions of merit is *essential* to a thorough analysis of whether the prerequisites . . . for class certification are satisfied, failing to undertake such consideration is clear error and an abuse of discretion." *Id*. at Syl. Pt. 8 (emphasis in original). Because the circuit court's analysis of the regulation and statute relied upon by Plaintiffs was essential to its adoption of a "liability" issues class under Rule 23(c)(4), its interpretation of those provisions must be addressed in any review of the circuit court's class certification ruling.[6]

As set forth below, whether WV American violated C.S.R. § 150-7-5.1.a. and W. Va. Code § 24-3-1 cannot be determined without examination of what happened—the actual impact on the

[6] This Court reviews a circuit court's order granting or denying class certification under an abuse of discretion standard. Syl. Pt. 1, *In re W. Va. Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003). However, a circuit court "abuses its discretion if its decision is based on an erroneous understanding of governing law. Accordingly, legal questions arising in class certification proceedings are reviewed de novo." *Cleven v. Mid-Am. Apartment Cmyts., Inc.*, 20 F.4th 171, 176 (5th Cir. 2021) (internal quotations and citation omitted); *see also Johnson v. Nextel Comm. Inc.*, 780 F.3d 128, 137 (2d Cir. 2015) ("Although we review class certifications for abuse of discretion, we review de novo 'the district court's conclusions of law that informed its decision' to certify a class.") (citation omitted); *In re Rezulin*, 214 W. Va. at 61, 585 S.E.2d at 61 (whether circuit court correctly interpreted Rule 23 as part of class certification decision was a question of law reviewed de novo). Accordingly, the circuit court's legal analysis of WV American's relevant duties under contract, tort, or statute, and what is required to establish liability thereunder, are legal questions reviewed de novo.

customer. This is because its service obligation is expressly tied, under the statute and regulation, to providing reasonable service. Because there is no dispute that this impact cannot be assessed on a classwide basis, certification of a liability class is improper.

1. The circuit court erred when it found the existence and extent of any impact to a customer's water supply is not relevant and need not be proven to establish WV American's liability under C.S.R. § 150-7-5.1.a. and W. Va. Code § 24-3-1.

A public utility's duty to its customers is one of reasonable and adequate—not uninterrupted—service. "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders." *United Fuel Gas Co. v. R.R. Comm'n of Ky.*, 278 U.S. 300, 309 (1929). This distinction is reflected in the PSC's Rules for the Government of Water Utilities, which state, "These rules are intended to ensure adequate service to the public . . . ." W. Va. C.S.R. § 150-7-1.5.b; *see also* W. Va. Code § 24-1-1(a)(2) (conferring authority and duty to regulate public utilities upon PSC in order to, *inter alia*, "[p]rovide the availability of adequate, economical and reliable utility services"). Adequate service "is not tantamount to infallible service," *In re Ill. Bell Switching Station Litig.*, 641 N.E.2d 440, 445 (Ill. 1994), which is an impossible standard. This is why courts have recognized that "[t]emporary disruptions may occur without reducing . . . service to a level less than adequate, efficient or reliable." *Id.*

The contractual basis upon which WV American serves its customers is its tariff, which incorporates regulatory obligations promulgated by the PSC. Plaintiffs' breach of contract claim is based upon WV American's alleged violation of C.S.R. § 150-7-5.1.a.: "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 (emphasis added). Notwithstanding the plain language addressing service, Plaintiffs urged the circuit court to adopt an unsupported statutory

interpretation that the italicized language is a subordinate clause that can be ignored.[7] While admitting "[a] duty to furnish safe, adequate and continuous service would appear to require proof that WVAW failed to provide safe, adequate, and continuous service in order to show a breach," Plaintiffs argued "that is not the duty at issue." App. at 1739. Instead, Plaintiffs argued "the duty at issue is the duty to 'construct and maintain its entire plant and system' *in a suitable condition to prevent service interruptions*, and WVAW breached or did not breach that duty based on the condition that the system was in at the time of the main break, and whether that condition was up to the standard." *Id*. (emphasis added). Although the italicized phrase in Plaintiffs' described duty appears nowhere in the rule, the circuit court's order adopted Plaintiffs' interpretation verbatim:

> The duty at issue is the duty to "construct and maintain its entire plant and system" in a suitable condition to prevent service interruptions, and WV American breached or did not breach that duty based on the condition that the system was in at the time of the main break, and whether that condition was up to the standard required under the contract, judged before the break occurred.

App. at 2151. Under this ruling, customers have a cause of action, and WV American can be declared liable on a classwide basis, solely on evidence of the condition of its system at the time of the main break, with no consideration as to whether a customer's service was affected, much less the degree to which it was affected. *Id.*

The circuit court's rewriting of the applicable regulatory provision to establish a new liability standard requiring that utilities "prevent service interruptions" constitutes a clear error of law and violates multiple principles of construction. It ignores the fundamental principle that statutes and regulations are enacted as a whole and all parts must be read together. Syl. Pt. 4, *Pool v. Greater Harrison Cty. Pub. Serv. Dist.*, 241 W. Va. 233, 821 S.E.2d 14 (2018) ("Words and clauses should be given a meaning which harmonizes with the subject matter and the general

[7] Plaintiffs introduced this interpretation for the first time in their Reply brief on remand, App. at 1734, but the circuit court denied WV American's request to file a surreply. App. at 1784.

purpose of the statute.") (citation omitted). When the regulation is read as a whole, WV American's duty to construct and maintain its system is for the purpose of furnishing safe, adequate, and continuous service to its customers.

Agency regulations should also be interpreted consistent with the intent and purpose of the statutes and legislative scheme under which they were promulgated. "Any rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation." Syl. Pt. 4, *Maikotter v. Univ. of W. Va. Bd. of Tr./W. Va. Univ.,* 206 W. Va. 691, 527 S.E.2d 802 (1999). "Although an agency may have power to promulgate rules and regulations, the rules and regulations must be reasonable and conform to the laws enacted by the Legislature." *Anderson & Anderson Contractors, Inc. v. Latimer,* 162 W. Va. 803, 807–08, 257 S.E.2d 878, 881 (1979). Here, the circuit court's interpretation is inconsistent with the purpose and directives of both the PSC's Rules for the Government of Water Utilities and the enabling legislation to provide reasonable service to the public as described above.

This standard of reasonable service is apparent on the face of § 24-3-1, which provides that public utilities 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*." W. Va. Code § 24-3-1 (emphasis added). When read as a whole, the purpose and language of the statute is tied to the provision of reasonable service by a utility to its customers.

The circuit court's interpretation of liability under C.S.R. § 150-7-5.1.a and § 24-3-1 as being divorced from any consideration of impacts upon customer service disregards their language and constitutes clear error. For liability to exist, each customer must show that his or her service was reduced to a level less than reasonable. *See In re Ill. Bell*, 641 N.E.2d at 445.

2. The impact to a customer's service, and whether WV American failed to provide reasonable service, is a threshold requirement of liability, not solely a damages issue.

The circuit court concluded, and Plaintiffs do not dispute, that the impact to a customer's service is an individualized inquiry that cannot be established on a classwide basis. App. at 2152. However, the circuit court held that impact is an issue of damages to be addressed after a liability determination, rather than an element necessary to demonstrate liability. This distinction between liability and damages is important when applying the required thorough analysis under Rule 23. *See Gaujot II*, 242 W. Va. at 64, 829 S.E.2d at 64.

The circuit court erred in failing to recognize the role of customer impact in establishing liability under the regulatory and statutory provisions governing Plaintiffs' claims. The service impact to a customer and the degree of any such impact goes directly to the heart of the liability issue, which is whether WV American provided reasonable water service. The fact that service impact may also be relevant to damages does not mean, as recognized in *Gaujot II*, that the issue can be relegated *solely* to damages when the impact to a customer's service, which is conceded to be an individual issue,[8] goes to the core of liability. 242 W. Va. at 64, 829 S.E.2d at 64 (identifying controlling statute as "framed such that liability and damages are two sides of the same coin," and recognizing damages would need to be determined as part of the threshold liability determination).

Requiring a showing of sufficient service impact before a utility can be declared liable to its customers simply makes policy sense. Courts and commentators have cautioned against expansive views of duties in the context of public utilities given the potentially huge and crippling

[8] Following additional discovery conducted after remand in the *Gaujot* matter, the circuit court found, and this Court concurred, that a sufficient method was identified whereby liability could be determined on a classwide basis using common proof. *State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot*, No. 21-0737, 2022 WL 1222964, at *6 (W. Va. Apr. 26, 2022) ("*Gaujot III*"). In this case, there is no dispute that service impact cannot be determined on a classwide basis.

liability that can result from single disruptions in service.

> The better explanation for limitations on the duty of public utilities, also expressed in *Moch*, is concern about the huge magnitude of liability to which a utility might be exposed from a single failure to provide service that affects hundreds, thousands, or, in the case of an electrical blackout, millions of people.

Restatement Third, Torts: Liability for Physical and Emotional Harm § 42 cmt. I (Am. L. Inst. 2012); *see also H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 899 (N.Y. 1926) ("[L]iability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty."). This Court has also been mindful of the potential for expansive and limitless liability when considering the scope of duties generally. *See Aikens v. Debow*, 208 W. Va. 486, 502, 541 S.E.2d 576, 592 (2000) (noting that "courts and commentators have expressed disdain for limitless liability and have also cautioned against the potential injustices which might result").

In contrast to these protective principles, the circuit court's interpretation effectively provides that public utilities like WV American can have "negligence in the air," which has long been recognized as insufficient. *See Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928). The circuit court makes this error clear with its guardrail comparison (taken directly from Plaintiffs' brief): "The lack of a guardrail might render one stretch of road unsafe even though no one ever drives off the cliff." App. at 2152. Just as it would be error to certify a liability class of individuals who drove along the road with no guardrail without considering whether anyone drove off the road, the circuit court erred here by certifiying a class of individuals based solely on allegations that WV American's facilities were generally inadequate without any showing of customer service impact. The circuit court's logic runs contrary to decades of basic, well-recognized principles.

3. The impact determination required for liability is individualized and more complex than considered by the circuit court.

Both the circuit court and Plaintiffs acknowledge that differences in impact exist among potential class members, and that impact, if any, can only be evaluated on an individual basis.

However, the circuit court found that determination of those impacts in subsequent individual proceedings would require only a limited exercise of verifying the fact of impact. App. at 2154. The circuit court misconstrued the nature and complexity of the necessary impact inquiry. To demonstrate liability under the applicable regulatory and statutory provisions, Plaintiffs must show not just the fact of impact, but also the extent and proof that the impact was sufficient to make the class member's service less than reasonable. As explained further in Section V.C. below, the circuit court erred by failing to recognize these complexities and account for the required individualized proof in its Rule 23 evaluation.

First, Plaintiffs cannot establish on a classwide basis that all class members had even threshold levels of disruption to their service. As explained in Section II.A.5 above, Plaintiffs' expert conceded that his analysis of the June 2015 events cannot identify the specific impact to water service for any putative class member. Plaintiffs also cannot rely on the precautionary BWAs issued by WV American during the event to shortcut the impact inquiry (as first suggested in their Reply brief following remand, App. at 1873). The BWAs instructed 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, the applicability of BWAs to a customer depended on individual water impact and did not apply to customers in the area who had not experienced a water service impact. App. at 484–86.[9]

[9] This case is distinguishable from *Good v. W. Va.-Am. Water Co.*, 310 F.R.D. 274 (S.D.W. Va. 2015) based on differences in the scope and applicability of the BWAs. In *Good*, the entire Kanawha Valley water distribution system was placed under a Do Not Use order at the same time based on the threat of external chemical contamination. *See id.* at 280–81. In *Good*, then, the entire class, defined as those served by the Kanawha Valley water distribution system, were covered by the Do Not Use order. Here, as recognized by Plaintiffs, the applicability of the BWAs depended on the existence and extent of water service impact which is *not common* among the class. *See* App. at 633–34 (Plaintiffs' counsel: "[T]he advisory that went out here was boil water if you lose pressure. The advisory that went out in Crystal Good's case was not do not use the water if you smell MCHM. It was just do not use the water.").

Second, general disruptions in pressure or service alone, without any evidence of the extent or severity of that disruption, are not sufficient to show that WV American failed to provide reasonable water service. Service is not required to be infallible, and "[t]emporary disruptions may occur without reducing . . . service to a level less than adequate, efficient or reliable." *In re Ill. Bell*, 641 N.E.2d at 445. In fact, the PSC regulations expressly contemplate that there can and will be situations where service disruptions will occur.[10] The fact that the extent or severity of service disruptions exist on a continuum is evidenced by Plaintiffs' testimonies. Richard Jeffries testified that his only impact was one day of decreased water pressure at his home. App. at 157. Plaintiff Carolyn Burdette claimed, in contrast, that Colours Beauty Salon had no water for at least five or six days. App. at 214. To hold that any level of disruption across this continuum gives rise to liability is clear error.

Indeed, even for customers like Mr. Jeffries who had decreased water pressure, there is a broad continuum within this category that only further demonstrates the need for individualized analysis. Under PSC rules, 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. (2011). Thus, the PSC rules specifically recognize a range of acceptable pressure fluctuations. *See id.* (noting "[p]ressure variations outside the limits specified will not be considered a violation of this rule if they are infrequent and arise from unusual or extraordinary

[10] *See, e.g.*, C.S.R. § 150-7-4.8.a.2 (2011) (permitting water utilities to discontinue service without notice "[w]here conditions hazardous to life or property are found to exist on the customer's premises, or where the utility's regulating, measuring or distribution equipment or facilities have been tampered with"); *id.* § 150-7-4.12.d–h (2011) (outlining notice required for unscheduled interruptions in service); *id.* § 150-7-4.12.i (2011) (discussing reasonably efforts to ensure alternative water supplies for essential domestic use are made available in the case of an unscheduled interruption occurring due to an emergency situation); *id.* § 150-7-4.14.a–g (2011) (explaining rationing plans and discussing water utilities' ability to restrict use of water).

conditions"). Some customers also signed 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 to not hold the company "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.

Last, the reasonableness of service cannot be evaluated in a vacuum and viewed through the lens of one hour, or one day, or one week. For example, Mr. Jeffries testified that he has lived in his current residence for 38 years, and that over those 38 years, he lost water service once for about a day and lost water pressure twice. App. at 175. When asked if he thought that was reasonable service over those 38 years, he replied that it is "very reasonable." *Id.*

C. The Circuit Court Clearly Erred in Certifying a Liability Class Pursuant to Rule 23(c)(4), Relying on Its Incorrect Finding that Liability Could Be Determined on a Classwide Basis Without Classwide Evidence of Service Impact.

1. The circuit court erred in finding commonality was satisfied under Rule 23(a)(2).

Under the Rule 23(a) commonality criteria, class representatives must show "there are questions of law or fact common to the class." W. Va. R. Civ. P. 23(a)(2). As the United States Supreme Court stated in *Wal–Mart Stores, Inc. v. Dukes* regarding the identical language of Fed. R. Civ. P. 23, it "is easy to misread, since '[a]ny competently crafted class complaint literally raises common questions.'" 564 U.S. 338, 349 (2011) (quotation omitted). Instead, "'[w]hat matters to class certification . . . is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.'" *Id*. at 350 (quotation omitted); *see also EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 (4th Cir. 2014). In *Gaujot II*, interpreting West Virginia Rule 23(a)(2), this

Court cited and adopted that same logic, holding 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 II*, 242 W. Va. at 54, 829 S.E.2d at 54 (quoting *Dukes*, 564 U.S. at 350) (internal quotations omitted)).

The circuit court found there was commonality because "core issues of liability are common to all class members," including "whether WV American breached its contracts for failing to maintain its facilities in such condition so as to provide an adequate and continuous water service, and whether WV American violated its statutory duties to maintain adequate and suitable facilities." App. at 2146. The circuit court expressly excluded from its consideration of these "core liability" issues any evaluation of the existence and extent of each class member's service impact, an undisputedly individual issue, as not relevant to commonality. *Id.*

However, as set forth above, the extent of any impact to a customer's water service goes to the very heart of liability under the statutory and regulatory provisions upon which Plaintiffs' claims are based. *Compare Gaujot II*, 242 W. Va. at 64, 829 S.E.2d at 64 (finding statute "framed such that liability and damages are two sides of the same coin"). Both W. Va. Code § 24-3-1 and C.S.R. § 150-7-5.l.a link adequate facilities to reasonable service, and those concepts cannot be divorced. The circuit court found that "[t]he fault or liability determination will rely upon common class-wide evidence related to WV American's conduct prior to the June 2015 main break, and what it did or failed to do to maintain an adequate water system that complied with its contractual and statutory duties." App. at 2161. The circuit court further found that liability across all causes of action turned on Plaintiffs' allegation that WV American "knew or should have known that a

serious break along this particular main was so likely—and that the consequences of service interruption expected following such a break so great—that its failure to take at least some measure to prevent or reduce the likelihood of that outcome constituted violations in several respects." App. at 2157. But the "measures" Plaintiffs propose are not limited to replacing the main at issue or preventing the break itself. *See* App. at 1895 ("Plaintiffs' counsel: "And they consider many things they could do to make that situation tenable, to bring it up to the standard of care. It doesn't have to be replace that main with a different main.").

Instead, Plaintiffs and the circuit court focus significantly on measures related to increasing redundancy in the system during a break on this main. App. at 2151–52 ("WV American could have eliminated the risk of an extended service interruption from this predictable main break by taking any one of these steps: constructing an additional main or mains, building more storage tanks, or even creating an interconnection with another water system."). Thus, the adequacy of WV American's facilities and, therefore, liability pursuant to the circuit court's order, would be based on a level of redundancy in the system and the ability to supply water during a break on the main at issue.

While these may be common questions, they cannot produce common answers across the entire class as required for commonality. *See* Syl. Pt. 3, *Gaujot II*, 242 W. Va. at 56, 829 S.E.2d at 56. As explained, the characteristics of the distribution system vary throughout the system, and for the same reasons that water service impact undisputedly requires individual inquiry, an analysis of the adequacy of facilities will require the same. Whether a customer continued to receive regular service during the break or experienced an impact depends on 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. The level

of redundancy in the system varied such that some customers experienced no interruption, while others experienced varying degrees of interruption. The level of service provided is necessarily linked to the adequacy of the system supplying each customer, and even if maintaining adequate facilities stood alone as an abstract duty, evaluating whether facilities were adequate is not susceptible to a single determination common across the class.[11]

2. The circuit court erred in finding typicality was satisfied under Rule 23(a)(3).

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)). Thus, to demonstrate "typicality," Plaintiffs must demonstrate "the claims or defenses of the representative parties are typical of the claims or defenses of the class," W. Va. R. Civ. P. 23(a)(3), and the court must "describe in specific detail the legal and factual foundations underlying the class." *Swope*, 242 W. Va. at 267, 835 S.E.2d at 131 (reversing circuit court's order finding typicality because it provided only a "general, non-specific" review). Typicality limits the class

[11] WV American previously filed a motion seeking application of the primary jurisdiction doctrine and referral of Plaintiffs' claims to the PSC. Plaintiffs have argued that WV American's position in the class certification phase that the existence and extent of water service impact must be considered in determining liability is inconsistent with WV American's position in briefing the PSC motion. App. at 1042.

Plaintiffs mischaracterize WV American's basis for, and arguments in support of, the PSC referral motion, which was filed in response to Plaintiffs' Complaint alleging that any interruption in service constituted breach of contract under the PSC Water Rules at issue. App. at 23; Compl. ¶29. WV American sought referral to the PSC for purposes of confirming that the level of service required is reasonable, not uninterrupted, and defining reasonable service within the context of system and financial considerations. App. at 1033–34. The circuit court denied the motion. WV American's position in the PSC motion was the same as it is now, that determining liability under the regulation and statute at issue requires consideration of both the adequacy of facilities and the level of water service provided as a result. By contrast, Plaintiffs have reversed their original position that water service interruption alone constituted breach of the applicable duties. App. at 23; Compl. ¶29 (stating that "[w]hether 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").

members' claims "to those fairly encompassed by the named plaintiffs' claims." *In re Rezulin*, 214 W. Va. at 68, 585 S.E.2d at 68 (citations omitted). The circuit court's order addresses typicality in a single paragraph. While acknowledging "[i]t is true, as WV American urges, that potential differences exist in the degree of service interruption experienced from one class member to the next," the court found typicality because "the claims remain predicated upon behavior by WV American which was directed toward the Class as a whole." App. at 2147.

The lack of evidence supporting this typicality finding is amply demonstrated by the named Plaintiffs' testimonies, both of whom were recruited for this litigation. Plaintiff Jeffries had "very little" water, meaning low pressure, at his home for a day, App. at 157, whereas his sister in Red House had water "the whole time," and his son-in-law in Rock Branch had low water pressure. App. at 159, 162. Colours Beauty Salon owner Carolyn Burdette could not "remember exact dates," but thought she lost water for "probably five or six days." App. at 200–01, 214. These facts show the circuit court cannot determine whether there is a "typical" impact on the class. *See Ways v. Imation Enters. Corp.*, 214 W. Va. 305, 314, 589 S.E.2d 36, 45 (2003) (circuit court did not abuse discretion in finding typicality not satisfied in breach of contract claim where "individualized evidence as to the specific circumstances surrounding the alleged promises is required").

This case is different than *Surnaik II* because there is no evidence here comparable to the smoke intrusion into all houses in the geographic area. This case is more like *State ex rel. W. Va. Univ. Hosps. - E., Inc. v. Hammer*, 246 W. Va. 122, 866 S.E.2d 187 (2021), where the plaintiff (Roman) sought certification of a class making claims that medical records were improperly accessed by a rogue hospital employee (Roberts) who provided them to her criminal boyfriend. Reversing the circuit court's order as to typicality, the Court found "[t]he lack of evidence

establishing that Ms. Roberts actually accessed Mr. Roman's information calls into question whether his claims are, in fact, typical of the class he has been appointed by the circuit court to represent." *Id.* at 202.

The same is true here: no evidence exists demonstrating similarity between Plaintiffs' claims and those of the class because of the need for individual analysis of impact and reasonable service, which cannot be determined classwide. Instead, the evidence shows that upon individual analysis, the proposed class members would have widely disparate impacts from the named Plaintiffs. The circuit court's failure to address these significant differences in its cursory finding of typicality is clear error.

3. The circuit court clearly erred in certifying a "liability" class under Rule 23(c)(4) where Plaintiffs conceded that neither the entire action nor any single claim could satisfy the Rule 23(b)(3) requirements.

From their initial class certification motion, Plaintiffs have conceded that customer impact (which they characterize as related to damages) and other issues including causation cannot be determined through the presentation of common evidence, and thus precluded class certification of the entire cause of action under Rule 23(b)(3). For this reason, Plaintiffs pursued another path, asking the circuit court to certify a narrower "liability issues" class under Rule 23(c)(4). App. at 2167. That certification was clear error because the circuit court misapplied the procedural mechanism of Rule 23(c)(4) to dilute the substantive fairness protections of Rule 23(b)(3), and allowed Plaintiffs to manufacture a class without appropriately satisfying the predominance and superiority requirements for their claims.

Rule 23(c)(4) provides "[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues." W. Va. R. Civ. P. 23(c)(4)(A). Consistent with its text and placement in the procedural portion (section c) of Rule 23, Rule 23(c)(4) creates a tool for the management of a class action *that otherwise satisfies the detailed and express requirements*

for certification under Rule 23(a) and Rule 23(b). Though the circuit court held otherwise, App. at 2153, 2157, Rule 23(c)(4) does not provide an independent substantive category for certification—that is reserved to the three specific class types in Rule 23(b).

This Court has not yet addressed the application of Rule 23(c)(4) and its interaction with the other Rule 23 requirements, particularly predominance and superiority under Rule 23(b)(3). However, a well-recognized concern is the ability for plaintiffs to "manufacture predominance through the nimble use of subdivision (c)(4)." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). In other words, if predominance is not met for the entire cause of action under Rule 23(b)(3), a trial court should not allow plaintiffs to use Rule 23(c)(4) to narrow down the issues until predominance is met. This concern has led to differing views in the federal courts as to how Rule 23(b)(3) and Rule 23(c)(4) interact. Some courts have held that all of plaintiffs' claims, *i.e.*, the case as a whole, must satisfy Rules 23(a) and (b) before a court can certify an issues class under Rule 23(c)(4). *See id.* at 745 n.21. The more liberal view, espoused, for example, by the Ninth Circuit, permits the use of Rule 23(c)(4) to certify discrete issues, even if no single cause of action satisfies the predominance requirement. *See Valentino v. Carter-Wallace*, *Inc*., 97 F.3d 1227, 1234 (9th Cir. 1996). The Fifth Circuit identified the problem with this approach as follows:

> Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

Castano, 84 F.3d at 745 n.21.

Notwithstanding these critical concerns, the circuit court here expressly certified a "liability issues" class under Rule 23(c)(4). The circuit court provided little analysis for its

decision that Rule 23(c)(4) alone could support issue certification, relying primarily on the Fourth Circuit's decision in *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003). *See* App. at 2144, 2145. But the circuit court misread *Gunnells* in suggesting that it supports certification solely of *issues*; instead, the Fourth Circuit stated that "subsection 23(c)(4) should be used to separate 'one or more' *claims* that are appropriate for class treatment, provided that within that claim or claims (rather than within the entire lawsuit as a whole), the predominance and all other necessary requirements of subsections (a) and (b) of Rule 23 are met." *Gunnells*, 348 F.3d at 441 (emphasis added); *see also Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc.*, 254 F.R.D. 68, 77 (E.D.N.C. 2008) ("Specifically, the *Gunnells* court appeared to hold that a district court may only certify individual causes of action, not individual issues, for class treatment.").

Thus, the circuit court's application of Rule 23(c)(4) to exclude complex individualized issues from the predominance analysis is not consistent with the policy of ensuring fairness through application of the Rule 23(b)(3) requirements. There was no contention or finding that Plaintiffs' cause of action as a whole satisfied the predominance requirement consistent with *Castano*, or even that any one of the three claims independently satisfied the predominance requirement consistent with *Gunnells*. By certifying a class under Rule 23(c)(4) that both Plaintiffs and the circuit court acknowledge was not capable of certification under Rule 23(b)(3), the circuit court exceeded the authority allowed under Rule 23(c)(4).[12]

Contrary to its suggestion that certifying a class on liability issues will eliminate "any risk of 'sacrificing procedural fairness,'" App. at 2160, the circuit court's ruling threatens particularly

[12] The circuit court incorrectly suggests that Rule 23(c)(4) would be "completely pointless if certification of common issues were not permitted in cases where individual issues might remain following the resolution of those common issues." App. at 2153. Consistent with its status as a management tool, Rule 23(c)(4) can be used to separate individual issues for resolution outside of the class trial, but only after the overall class has been determined to meet the predominance and superiority requirements of Rule 23(b)(3).

severe potential outcomes for WV American and other regulated public utilities. 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 approach of certifying a liability issues class under Rule 23(c)(4) without requiring any evidence of customer impact, utilities face the risk of class certification any time a putative class plaintiff asserts that their past behavior has not lived up to a standard for maintenance or redundancy, and could then face a jury determination that it breached a duty to an entire class of customers *before any evidence is required that the event unreasonably impacted the putative class members*. Placing this uncontrolled risk of essentially automatic certification on a public utility subject to government-regulated rates does not promote fairness or good public policy.[13] This Court should reject the circuit court's unbounded use of Rule 23(c)(4) and affirm that the critical threshold requirements of Rule 23(a) and 23(b) must be satisfied before Rule 23(c)(4) is appropriate for class management purposes.

4. Even if Rule 23(c)(4) provided a basis for class certification, the circuit court clearly erred in finding the Rule 23(b)(3) predominance and superiority requirements were satisfied.

a. The circuit court applied a flawed analysis and erred in finding common issues predominate over individual issues.

The circuit court's reliance on Rule 23(c)(4) does not supersede its obligation to find as a

[13] Class certification, however narrow the issues certified may be, raises the stakes in any litigation and can pressure defendants to consider settlement regardless of the merits of the underlying claims. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (cautioning that a defendant may be "pressured into settling questionable claims" by "even a small chance of a devastating loss"); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

precursor to class certification "that the questions of law or fact common to members of the class predominate over any questions affecting only individual members." W. Va. R. Civ. P. 23(b)(3). To determine predominance, a trial court must conduct a "thorough analysis" that includes "(1) identifying the parties' claims and defenses and their respective elements; (2) determining whether these issues are common questions or individual questions by analyzing how each party will prove them at trial; and (3) determining whether the common questions predominate." Syl. Pt. 7, *Surnaik I*, 244 W. Va. at 248, 852 S.E.2d at 748. Though the circuit court revised the predominance discussion in its certification order on remand, the court's analysis remains flawed based on its incorrect interpretation of the elements of Plaintiffs' claims and parallel failure to consider important facts in its predominance analysis.

The circuit court emphasized in its Rule 23(b)(3) analysis that it considered breach of duty and liability to be capable of determination through common proof for all three of Plaintiffs' claims. *See* App. at 2153, 2155. As explained in Section V.C.4.b, this reading is incorrect: WV American's potential breach of duty and liability is dependent upon and requires an individual finding as to whether each customer's service was impacted, and if so, to what extent. That individual information, in turn, must be assessed by the factfinder to determine whether water service impacts experienced constituted less than reasonably adequate service. There is no dispute that these issues are individualized and not amenable to class treatment, but the circuit court nonetheless justified certification under Rule 23(c)(4) by incorrectly concluding that the impact to a customer's service goes to damages and not liability.

The circuit court's analysis overstates what can be determined at a class trial and drastically understates the nature and extent of the individual issues that will require separate determinations in thousands of individual trials for class members who seek recovery. The

individualized issues that the circuit court miscast as going solely to damages in its analysis include whether there was impact to the individual plaintiff associated with the June 2015 events, and if so, what was the nature of that impact (water interruption, reduction in water pressure, applicability and compliance with Precautionary BWA), and what was the duration and timing of the impact. But that is not the sole extent of the individualized analysis. If there was any impact, the jury in the individual proceeding will have to assess whether that impact was sufficient to breach the obligation to provide reasonable service, including potentially assessing evidence regarding pressure variations relative to normal pressure and past service, and applicability and compliance with the BWA. These issues include technical considerations and likely will involve expert evidence and data beyond just factual testimony of the class member. Individual causation issues will also remain, including whether and how the different leaks in June 2015 affected different customers and whether and how the actions Plaintiffs claim WV American should have taken before the event to avoid a breach would have prevented or mitigated water service impacts to specific class members; these issues are intertwined with liability and not merely "trivial" as suggested by the circuit court. *See* App. at 2154, 2156. There are also threshold questions affecting whether a duty even exists that requires individual consideration, including the potential that the customer had signed a "pressure waiver" agreement that would affect liability or that the claimant's status (*e.g.*, as a non-customer) would affect the ability to bring certain claims. Business plaintiffs like Colours will have to prove any claimed economic losses which may implicate complex causation and mitigation issues requiring expert accounting testimony. Thus, the circuit court's finding that issues focused only on WV American's pre-event actions can predominate over the remaining individual issues and determine breach and liability is inconsistent with a thorough analysis of the elements of Plaintiffs' claims under this Court's factors identified in *Surnaik I*.

The circuit court clearly erred by mischaracterizing the scope and complexity of the remaining individual issues that must be tried for each class member and failing to even consider the demonstration of reasonable service as an individual trial issue. *See* App. at 2160. WV American has the right to defend itself in front of a jury against any class member who seeks recovery, *see Dukes*, 564 U.S. at 367, and these trials will need to resolve complex factual issues and address disputed expert testimony. The circuit court's limited discussion of how these subsequent individual proceedings would be managed does not demonstrate a workable approach and further undermines its finding of predominance. *See* App. at 2160. Courts have rejected this exact "figure-it-out-as-we-go-along" approach, finding it inadequate to support the required rigorous analysis of Rule 23(b)(3) factors.[14] *See Prantil v. Arkema Inc.,* 986 F.3d 570, 578 (5th Cir. 2021) (citing *Madison v. Chalmette,* 637 F.3d 551, 557 (5th Cir. 2011)).

These facts regarding predominance stand in contrast with those in *Surnaik II*, 875 S.E.2d at 183, where the circuit court found, and the parties did not dispute, that the elements of duty and breach were identical for each class member because they turned entirely on maintenance of a fire protection system that affected all class members the same way and could be assessed with common classwide proof. As discussed, no such finding can be made here. To the contrary, WV

[14] The circuit court further failed to address how the issue of Plaintiffs' punitive damages claims would be tried in the subsequent individual trial phases. The court expressly rejected Plaintiffs' request for a classwide determination of a punitive damages multiplier, confirming "that decisions impacting the amount of any potential punitive damages award should not be made without full consideration of the extent of harm caused and other aspects of compensatory damages." App. at 2166. Because these harm and compensatory damages issues are to be determined individually, the potential punitive damages claims also must be addressed individually for each claimant. But the circuit court does not address how such issues would be managed, including the implementation of W. Va. Code § 55-7-29 and whether yet another phase of individual trials may be required (as conceded by Plaintiffs' counsel). *See* App. at 628–29 (Plaintiffs' counsel: "So, you'd have phase one, liability; phase two, compensatory damages; and then a third phase, after you've already awarded everybody's compensatory damages . . . we're going to decide . . . whether they were motivated to do all those things that you would do under the statute."). *See also In re Pacific Fertility Ctr. Litig.*, No. 18-CV-01586-JSC, 2020 WL 3432689, at *6 (N.D. Cal. June 23, 2020) (noting the lack of efficiency in granting a class on general issues when plaintiffs' claims for punitive damages would require that the same evidence be presented again in subsequent individual trials).

American's liability cannot be established without requisite proof that each customer suffered the actionable, threshold impact to water service that fell below reasonable service.

This Court also found that the plaintiffs in *Surnaik II* had presented evidence—both fact and expert—sufficient to show the threshold fact of damage based on common evidence: "the mere invasion of property by dust, smoke, or other noxious elements [can] be actionable." *Id.* at 185. Thus, the Court concluded "the evidence supports the circuit court's threshold finding that all properties within the geographically designated isopleths, and any individuals within those properties, were exposed to levels of smoke particulates at levels sufficient to cause interference with the use and enjoyment of those properties." *Id.* This did not happen here. Plaintiffs did not demonstrate, and the circuit court did not identify, a basis for demonstrating common proof of impact to the entire class. In fact, the circuit court acknowledged that it was certifying a liability class without being provided or otherwise finding any mechanism for determining the threshold fact of injury or extent of impact on a classwide basis, *see* App. at 2148 (finding that "Plaintiffs have not proposed to prove (by formula or otherwise) that damages can be calculated on a class-wide basis"), because it found those issues were not part of a liability determination.

When the analysis appropriately accounts for the determination of the existence and extent of impact and reasonable service as complex individual elements of liability, the proposed class trial will not resolve even breach of duty, let alone liability, for even one claim for one potential class member. *See Surnaik I*, 244 W. Va. at 259, 852 S.E.2d at 759 ("If proof of the essential elements of the claim requires individual treatment, then class certification is unsuitable.") (citation omitted). Thus, the common issues proposed for classwide resolution by Plaintiffs do not predominate over the myriad of individual issues that will remain for individual trials for each and every class member and certification should be denied. This is consistent with federal precedent

rejecting certification of classes under Rule 23(c)(4) when the class determinations would not materially advance the litigation[15] and when the common issues are inextricably intertwined with non-common issues.[16]

Plaintiffs may direct the Court to the Florida circuit court decision in *Las Olas Co. v. Fla. Power & Light Co.*, No. CACE19019911, 2020 WL 9874296 (Fla.Cir.Ct. Dec. 14, 2020), as an example of a court certifying a liability class following a water interruption event. However, the *Las Olas* case is distinguishable because in finding predominance the court expressly relied on its finding that there is "no dispute in the record that the Water Main Break occurred and caused an interruption of water service for *all of the class members* within the region identified on the Official Diagram" defining the leak impact area. *Id.* at *7 (emphasis added). No such finding can be made in this case where water service impact is an individual rather than a common issue.

This case 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 these cases due to individualized negligence, specific causation, and damages issues. *See, e.g.*, *Abbott*

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[15] *See, e.g.*, *Reitman v. Champion Petfoods USA, Inc.,* 830 F. App'x 880, 881 (9th Cir. 2020) ("Indeed, Rule 23(c)(4) enables a district court to certify an issue class '[w]hen appropriate,' but a court does not abuse its discretion when it declines to do so because certifying a class does not 'materially advance[ ] the disposition of the litigation as a whole.'"); *Smith-Brown v. Ulta Beauty, Inc.*, 335 F.R.D. 521, 535 (N.D. III 2020) ("[T]he Court does not find that certifying the plaintiffs' proposed common issues for class treatment would 'materially advance' the resolution of plaintiffs' and the other class members' claims . . . ."); *In re Paxil Litig.*, 212 F.R.D. 539, 543 (C.D. Cal. 2003) ("[C]ourts have refused to apply Rule 23(c)(4) when such application would not significantly advance the litigation.").

[16] *See, e.g.*, *Martin v. Mountain State Univ., Inc.*, No. 5:12–03937, 2014 WL 1333251, at *6 (S.D.W. Va. Mar. 21, 2014) (finding common liability issues did not predominate where intertwined with individual inquiry of harm from closing of college); *In re Motor Fuel Temperature Sales Pracs. Litig.,* 292 F.R.D. 652, 665 (D. Kan. 2013) ("Courts should not use Rule 23(c)(4)] 'if noncommon issues are inextricably entangled with common issues or . . . the noncommon issues are too unwieldy or predominant to be handled adequately on a class action basis.'").

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"); *Von Nessi v. XM Satellite Radio Holdings, Inc.*, No. 07–2820 (PGS), 2008 WL 4447115, at *1 n.1 (D.N.J. Sept. 26, 2008).

b. The circuit court clearly erred in finding that class action is a superior mechanism for adjudication of Plaintiffs' claims.

Rule 23(b)(3) also requires a showing "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," and the thorough analysis requirement of *Surnaik I* applies equally to superiority. 244 W. Va. at 261, 852 S.E.2d at 761. *Surnaik I* identifies various factors for consideration, including "the size of the class, anticipated recovery, fairness, efficiency, complexity of the issues and social concerns involved in the case," as well as the purposes of Rule 23, "including: conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities." *Id.* at 263, 852 S.E.2d at 763 (citations omitted). The circuit court concluded that superiority was satisfied, but made that determination based on its erroneous finding that "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 2161, 2163 (stating that "the Court sees no danger of liability proofs becoming dependent on individual circumstances").

The superiority requirement takes on enhanced importance in evaluating proposed "issues" classes under Rule 23(c)(4) because a key touchstone for courts is whether investing the resources in a class trial will significantly increase the efficiency of the overall litigation. *See Parker v. Asbestos Processing, LLC*, No. 011-CV-01800-JFA, 2015 WL 127930, at *15 (D.S.C. Jan. 8, 2015) (noting that for Rule 23(c)(4) issues classes "the superiority component of Rule 23(b)(3)

frequently comes into play to defeat class certification"). Where, as here, the court and the parties will still face individual trials for all class members on multiple claim elements, a narrow "issues" class is not the superior management tool. *See In re Atlas Roofing Corp. Chalet Shingle Prod. Liab. Litig.*, 321 F.R.D. 430, 447 (N.D. Ga. 2017) ("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.") (citations omitted). 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); *Parker*, 2015 WL 127930, at *16 (summarizing list of cases denying issue class certification on superiority grounds).

Here, the circuit court accepted Plaintiffs' exaggerated claims regarding the resources required to litigate the limited common issues proposed for class trial without considering other viable options for managing individual claims, including consolidation, bellwether trials, and other techniques common for mass torts. *See, e.g.*, *Naparella v. Pella Corp.*, No. 2:14-CV-03465-DCN, 2016 WL 3125473, at *14 (D.S.C. June 3, 2016) (discussing management tools as alternatives to class certification). The court further overstates "the enormous benefits of the class device," suggesting without any support in the record that it could resolve "WV American's fault for many tens of thousands of customers having lost water service and being universally subjected to boil water advisories." App. at 2163. To the contrary, the proposed class trial will not establish fault as to any class member because whether individual impacts resulted in less than reasonable water service will not be determined until some unspecified later time in a "Phase II" process only

vaguely described by the circuit court.[17]

5. The circuit erred in certifying a class that is not sufficiently ascertainable.

"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). Plaintiffs have modified their definition of the proposed class over time, with the circuit court adopting Plaintiffs' most recent iteration, defined primarily 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 2167. The circuit court, in a single paragraph, found that this class was sufficiently ascertainable because it is made up of "WV American customers objectively defined as located within the geographical boundaries of the WV American service area served by the 36-inch water main that broke," citing expert testimony in Plaintiffs' Reply. App. at 2164–65.

The circuit court clearly erred in basing its ascertainability finding on Plaintiffs' characterization of the map prepared by Plaintiffs' expert Lorenz as an "objectively demonstrate[d] water service disruption boundary map." App. at 2165. Lorenz never represented that this map identified "the areas served by the 36-inch main that broke." Instead, he conceded in his deposition that portions of his map extended beyond the areas directly served by the 36-inch main, App. at 247–

[17] The circuit court also cites to the relatively low value of potential individual claims as a 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.*, *Romig v. Pella Corp.*, No. 2:14-mn-00001-DCN, 2016 WL 3125472, at *15 (D.S.C. June 3, 2016) (distinguishing *Good* and stating that "even 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 Antitrust Litig.*, 907 F.3d 42, 56 (1st Cir. 2018) (noting that Rule 23 is 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"). Here, the circuit court fails to consider the negative implications for public utilities, and their ratepayers, of the exposure to substantial liabilities arising from a class litigation approach that can effectively guarantee certification.

48; and that he evaluated broad pressure zones and not customer locations. App. at 244. Further, Plaintiffs' expert Seward Gilbert specifically noted that Lorenz's map included areas (including the entire city of St. Albans) that are not served by the relevant main, or even by WV American. App. at 251–52. Given these flaws, Lorenz's map provides neither an objective nor a reliable basis for defining the scope of the stated class definition.[18] Thus, reliance on these mismatched boundaries cannot avoid a more individualized assessment of class members that were within the targeted group. *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").

VI. CONCLUSION

If not addressed through Prohibition, the circuit court's errors described above would require complete reversal on appeal and an entirely new trial. The parties should not be "compelled to go through an expensive, complex trial and appeal from a final judgment," *Hrko*, 203 W. Va. at 658, 510 S.E.2d at 492, when the issues presented are fundamentally important legal issues "which may be resolved independently of any disputed facts." Syl. Pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 112, 262 S.E.2d 744, 745 (1979). Prohibition is the only adequate means of relief, and WV American respectfully moves this Honorable Court to grant this Petition for a Writ of Prohibition and issue a writ reversing the circuit court's Order Regarding Class Certification.

[18] The lack of clarity is reflected in the fact that the circuit court provides drastically different projections of class size within its order. *Compare* App. at 2145 (noting approximately 120,000 customers and residents in class) *with* App. at 2146 (stating 20,000 or 25,000 residential and business customers and as many as 50,000 total residents likely affected). Given the evidence that Lorenz's map does not actually match the class definition that the circuit court found that it "objectively" defined (areas served by the 36-inch main that broke), this case is distinguishable from the geographical boundary cases regarding ascertainability that were recently analyzed in *Surnaik II*, 875 S.E.2d at 186.

Dated: August 26, 2022

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.

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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., counsel for the Petitioner herein, do hereby certify that I have served the foregoing ***Verified Petition for Writ of Prohibition*** upon the following via electronic mail on this the 26th day of August 2022:

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