Nos. 23-2180 & 23-2181

IN THE UNITED STATES COURT OF APPEALS
OR THE TENTH CIRCUIT

ANTHONY DUNN, ET AL.,

Plaintiffs-Appellants/Cross-Appellees,

v.

SANTA FE NATURAL TOBACCO CO., INC., ET AL.

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court for the District of New Mexico (Albuquerque) (Hon. James O. Browning)
No. 1:16-MD-02695-JB-LF

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS

June 11, 2024

Frederick R. Yarger
Galen D. Bellamy
Kate Fletcher
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Telephone: 303.244.1800
Facsimile: 303.244.1879
Email: yarger@wtotrial.com
bellamy@wtotrial.com
fletcher@wtotrial.com

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

AMICUS CURIAE'S STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America submits this amicus brief under Federal Rule of Appellate Procedure 29.[1]

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region in the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

American businesses, including the Chamber's members, routinely must defend against putative class actions. Businesses—and,

[1] Amicus curiae states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

indirectly, the customers, employees, and communities that depend on them—have a strong interest in the proper application of the rules governing class certification because "[w]hen the central issue in a case is given class treatment" to be resolved "once and for all" by a single trier of fact, that single "roll of the dice" may expose defendants to staggering liability. *Thorogood v. Sears Roebuck & Co.*, 624 F.3d 842, 849 (7th Cir. 2010). Given such high stakes for the business community, the Chamber has a vital interest in ensuring that courts rigorously enforce class-certification requirements, including the requirement, grounded in the text, structure, and purpose of Federal Rule of Civil Procedure 23, that class membership be readily ascertainable using objective records not reasonably subject to dispute.

SUMMARY OF ARGUMENT

The Chamber agrees with the defendants that the district court abused its discretion in certifying any of the putative subclasses because their members are not ascertainable. The Chamber submits this brief to underscore that the ascertainability requirement is firmly rooted in Rule 23's text; to elucidate the district court's error in

certifying any of the subclasses; and to encourage the Court to clarify the proper analysis of the ascertainability requirement in this Circuit.

Ascertainability derives from several of Rule 23's provisions. It inheres in Rule 23(b)(3)'s predominance and superiority requirements and is implicit in Rules 23(a) and 23(c). If there are no ready means of identifying class members, it is impossible to know whether a class action is "superior" or whether common questions "predominate." Fed. R. Civ. P. 23(b)(3). And unless a court can clearly ascertain who belongs within (and thus outside of) a proposed class, analyzing Rule 23(a)'s requirements becomes highly problematic. In addition, in damages-seeking class actions, identifying absent class members upfront is the only way to ensure that they will obtain the "best notice that is practicable" so that they have a meaningful opportunity to opt out of a judgment that would otherwise bind them. Fed. R. Civ. P. 23(c)(2)(B).

Properly understood, the ascertainability requirement mandates that a class can be certified only if its membership is readily identifiable by reference to objective records that are not reasonably subject to dispute. Stated otherwise, identifying class members *before* a class is

certified must be administratively feasible. The district court found that the plaintiffs had failed to identify any objective or verifiable method to determine class membership, but it certified several subclasses anyway. This was an abuse of discretion.

Furthermore, because Rule 23 requires that "members of the class … be identified *before* trial on the merits," *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (emphasis added), the district court also abused its discretion by relegating ascertainment of class membership to a post-trial claims-administration process. In so doing, the district court excused the plaintiffs from their obligation to affirmatively prove—at the class certification stage—that all Rule 23 requirements are met. Also, in certifying various subclasses without ensuring that class members can be reliably ascertained, the district court functionally denied the defendants an opportunity to litigate important defenses or to challenge the plaintiffs' proof.

The Chamber asks this Court to reject the toothless versions of ascertainability applied by the district court and espoused by the plaintiffs and their supporting amici, which are contrary to Rule 23 and

raise significant due-process concerns. Instead, the Court should reaffirm its own existing precedent—which expressly acknowledges that class membership must be ascertainable at the class-certification stage—and take this opportunity to clarify not only that ascertainability is a certification-stage requirement but that class membership must be readily ascertainable by reference to objective records rather than self-serving, unverifiable affidavits from putative class members.

ARGUMENT

I. THE ASCERTAINABILITY REQUIREMENT FLOWS DIRECTLY FROM RULE 23.

For five decades, Rule 23 has been understood to require that "members of the class . . . be identified before trial on the merits." *Am. Pipe*, 414 U.S. at 547. This fundamental principle, called "ascertainability," requires that class members be "readily identif[iable] … in reference to objective criteria." *Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC*, 91 F.4th 202, 206 (4th Cir. 2024); *see also In re Niaspan Antitrust Litig.*, 67 F.4th 118, 130 (3d Cir. 2023). Ascertainability is a threshold requirement and "an 'essential' element

of class certification" necessarily "implied" and "encompassed" by Rule 23's text. 1 Newberg and Rubenstein on Class Actions § 3:2 (6th ed.) ("Newberg") (quotation marks omitted); *see John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007). Unless absent class members are readily identifiable, the court cannot perform the rigorous analysis that Rule 23 requires.

A. Rule 23(b)(3) requires an ascertainable class.

The ascertainability requirement is inherent in both of Rule 23(b)(3)'s express textual requirements: superiority and predominance. *Cf. Marcus v. BMW of N. Am.*, LLC, 687 F.3d 583, 592–93 (3d Cir. 2012) ("Many courts and commentators have recognized that an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria."); 1 McLaughlin on Class Actions § 4:2 (20th ed.) ("a Rule 23(b)(3) class must be presently ascertainable based on objective criteria").

To prove predominance, the plaintiff must establish "that the questions of law or fact common to class members predominate over any

questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). When class members are not readily ascertainable, it necessarily follows that the addition of each new claimant will generate individualized questions of fact concerning whether that individual is a member of the class. A court must take these questions into account when determining whether individual questions will predominate over common questions. *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (predominance not satisfied if identifying class members requires "extensive and individualized fact-finding" (internal quotation marks omitted)). This Court has held precisely that. *Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999) (affirming denial of certification of Rule 23(b)(3) class where district court "would have had to conduct individualized inquiries" to determine class membership).

As for Rule 23(b)(3)'s superiority requirement, a named plaintiff must show "that a class action is superior to other available methods for

fairly and efficiently adjudicating the controversy"—even after accounting for "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). A class action will not be manageable—and hence will not be "superior" to other methods of adjudication—if the only way to discern who is in the class is to conduct an individualized, member-by-member inquiry.

Although a class can be ascertainable without satisfying predominance and superiority, the converse is not true: Class-action plaintiffs cannot carry their burden of showing that predominance and superiority are satisfied unless class membership is ascertainable.

B. The ascertainability requirement is also implicit in Rules 23(a) and 23(c).

Ascertainability is also implicit in other parts of Rule 23. To start, Rule 23(a) presupposes the existence of an actual, identifiable "class." Fed. R. Civ. P. 23(a) (providing requirements for certification of "the class"); 7A Wright & Miller, Fed. Prac. & Proc. Civ. § 1760 (3d ed.) ("an essential prerequisite of an action under Federal Rule of Civil Procedure 23 is that there must be a 'class'"). For example, the ability to readily identify those who belong in the class is essential for

determining whether the typicality and adequacy requirements are met. Without identifying the absent class members and their claims, a district court cannot ensure that the named plaintiff's incentives do not conflict with those of absent class members. *Amchem*, 521 U.S. at 625 (the typicality and adequacy inquiries "serve[] to uncover conflicts of interest between named parties and the class they seek to represent").

Similarly, courts also understand Rule 23(c) to "contain the substantive obligation that the class being certified be ascertainable." 1 Newberg § 3:2 (collecting cases). This understanding flows from Rule 23(c)'s mandate that a court issue an "order" that "define[s] the class and the class claims, issues, or defenses" and a judgment that "include[s] and describe[s] those whom the court finds to be class members." Fed. R. Civ. P. 23(c)(1)(B), (c)(3)(A)-(B). A court must first "find" which persons are members of the class before it can define the class or describe its members.

The ascertainability requirement is particularly important to the opt-out rights of putative class members in actions seeking damages. Rule 23(c) requires courts to provide the "best notice that is practicable

under the circumstances," and it requires courts to direct that notice to "all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). But a court cannot determine the "best notice," nor determine which "members" must receive it, without first ascertaining who those members are. The ascertainability requirement thus "protects absent class members by facilitating the 'best notice practicable' under Rule 23(c)(2) in a Rule 23(b)(3) action." *Marcus*, 687 F.3d at 593.

II. BECAUSE NO SUBCLASS HERE IS ASCERTAINABLE, THE DISTRICT COURT ABUSED ITS DISCRETION IN CERTIFYING ANY OF THE SUBCLASSES.

Here, the district court abused its discretion in certifying any of the subclasses because (1) class is ascertainable only when membership can be shown by objective records not reasonably subject to dispute, and no such records have been identified here, and (2) a plaintiff must affirmatively prove ascertainability at the class-certification stage, and the plaintiffs here did not carry this burden.

A. The district court erred in certifying any subclass while acknowledging that membership in any subclass cannot be proven through objective records not reasonably subject to dispute.

As discussed, the ascertainability requirement is elemental to Rule 23(b)(3)'s predominance and superiority requirements. Its implications are therefore clear: A court must be able to determine class membership without recourse to individualized determinations or the weighing of conflicting evidence.

Multiple courts have recognized that ascertainability requires "objective criteria" to determine class membership. *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 465 (6th Cir. 2020); *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 655, 658 (4th Cir. 2019); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *Carrera v. Bayer Corp.*, 727 F.3d 300, 306-07 (3d Cir. 2013); *accord* 1 McLaughlin § 4:2 ("a Rule 23(b)(3) class must be presently ascertainable based on objective criteria"). Inherent in the notion of "objective criteria" is that satisfaction of those criteria be provable by objective records not reasonably subject to dispute, thereby enabling membership to be

determined in an administratively feasible way. *See In re Niaspan*, 67 F.4th at 133 ("[A] court necessarily considers whether the proposed class is based on objective criteria, not speculation, by looking at administratively feasible methods of defining the class ...."). Without objective records, each person's class membership is disputed, making it impossible to ascertain membership by reference to objective criteria. For this reason, in the context of ascertainability, "objective criteria" must mean objective records.

This too flows from Rule 23(b)(3): The presence or absence of the requisite objective records determines whether common questions will in fact "predominate" over individualized inquiries into class membership and whether a class action is truly the most "fair[] and efficient[]" way to adjudicate the controversy. Fed. R. Civ. P. 23(b)(3). If such records are absent, determining class membership will require "conducting a mini-trial of each person's claim." 1 McLaughlin § 4:2. That would be directly contrary to the very purpose of class actions.

Here, the district court erred in certifying any subclass because the putative class members' identities cannot be ascertained through

objective records. Indeed, the district court found just that. As the district court explained, although the plaintiffs asserted that class members could be identified based on "sworn affidavits, claim forms, receipts, or purchase records," they failed to "demonstrate[] that *any* class members ha[d] retained receipts or purchase records." *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Pracs. & Prod. Liab. Litig.* (*"Santa Fe"*), No. MD 16-2695 JB/LF, 2023 WL 6121894, at *109 (D.N.M. Sept. 19, 2023) (emphasis added). The plaintiffs also failed to "identif[y] a method or model which would allow the Defendants or the Court to screen affidavits for authenticity," and did not "suggest[] that such a method or model even exists." *Id.*[2]

In short, there is no objective method for determining whether any individual had in fact purchased the relevant product and was a member of any proposed subclass. Given this, the district court abused its discretion in nevertheless certifying subclasses in this case. "[W]here

[2] *See also id.* at *133, *139, *142, *145, *149, *153, *156, *161, *165, *169, *172, *175 (discussing "administrative feasibility concerns—namely difficulties in determining whether an individual purchased" the product at issue).

nothing in company databases shows or could show whether individuals should be included in the proposed class, the class definition fails." *Marcus,* 687 F.3d at 593; *cf. Krakauer*, 925 F.3d at 655, 658 (class members could be identified by objective criteria where class-wide records "obviated any concern" that the court would have to resort to "extensive and individualized fact-finding").

Contrary to the district court's view, "administrative feasibility" is included in the threshold requirement of defining a class based on objective criteria. *Santa Fe*, 2023 WL 6121894, at *108 & n.65 (acknowledging that "ascertainability requires a class definition that relies on objective criteria," while erroneously stating that administrative feasibility is not "part of the ascertainability prerequisite" because "the 23(b)(3) predominance and superiority analyses encompass the administrative feasibility determinations"). The absence of any objective method for determining class membership is not a mere "administrative difficult[y] at the claims administration stage." *Santa Fe*, 2023 WL 6121894, at *109. Rather, it is a total failure to meet the ascertainability requirement, and by necessary implication,

a total failure to adequately consider predominance-destroying individual questions. The ability to identify class members without resorting to a member-by-member inquiry is part-and-parcel of ascertainability, *see In re Niaspan Antitrust Litig.*, 67 F.4th at 133, and predominance, which is also lacking in this case.

Stated another way, ascertainability is not satisfied where it is administratively infeasible to determine membership in the class because the court must conduct individualized inquiries to do so. *See, e.g. EQT Prod. Co.*, 764 F.3d at 359 (district court abused its discretion in certifying class where determining membership would require "a complicated and individualized process"); *Hicks*, 965 F.3d at 464 ("To satisfy [the ascertainability] requirement, a class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." (internal quotations and citation omitted)). Indeed, this Court has affirmed denial of certification based on a district court's determination that the class definition was "administratively

infeasible" because "individualized inquiries" would be necessary to determine class membership. *Davoll*, 194 F.3d at 1146.

B. The district court also erred in certifying any subclass without requiring the plaintiffs to affirmatively establish ascertainability.

As noted by the Supreme Court, Rule 23 was amended in 1966 specifically "to assure that members of the class would be identified before trial on the merits." *Am. Pipe*, 414 U.S. at 547. Ascertainability problems therefore cannot be avoided by deferring disputes over class membership to a post-trial claims-administration process. And that approach also violates the Constitution and the Rules Enabling Act.

Here, the district court effectively relegated any meaningful ascertainability analysis to the claims-administration phase. And, in so doing, it excused the plaintiffs from proving that membership in any of their proposed subclasses is capable of identification by common evidence. This was an abuse of discretion for two reasons.

First, ascertainability is a threshold requirement of class certification. The plaintiffs therefore bear the burden to "affirmatively demonstrate"—at the certification stage—that class members can be

identified without burdensome individualized adjudication. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotations and citation omitted). And courts must "conduct a rigorous analysis to determine whether" the plaintiffs have carried that burden. *Id.*

Furthermore, the plaintiffs cannot meet their burden with "mere[]" assurances that they "will later meet Rule 23's requirements." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 164 (3d Cir. 2015). Rather, "actual, not presumed, conformance" with Rule 23's requirements is required. *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982); *see Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014) (plaintiffs "must actually prove—not simply plead—that their proposed class satisfies each requirement of Rule 23").

Here, by treating ascertainability as solely concerning questions of class management under Rule 23(b)(3)(D), *Santa Fe*, 2023 WL 6121894, at *108, the district court certified various subclasses even though the plaintiffs patently failed to affirmatively demonstrate ascertainability (or predominance more broadly). *See id.* at *109 (finding that the plaintiffs failed to demonstrate that any records of relevant purchases

existed or to even "suggest" that there exists "a method or model which would allow the Defendants or the Court to screen affidavits for authenticity").

Despite this fundamental error by the district court, the plaintiffs argue for an even more watered-down treatment. According to them, ascertainability is relevant only to superiority. (*See* Provisionally Sealed Opening Brief of Plaintiffs-Appellants/Cross-Appellees ("App. Br.") 49-57.) But even if ascertainability were properly treated solely as a case-management issue—and, to be clear, it is not so limited—cabining ascertainability to the superiority analysis would be improper. The text of Rule 23(b)(3) is clear: Difficulties in case management go to predominance as well as to superiority. *See, e.g.*, *Hamilton v. Wal-Mart Stores, Inc.*, 39 F.4th 575, 586 (9th Cir. 2022); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 242 (2d Cir. 2012); *see also Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003) (indicating

that "manageability of a class action" is "a requirement for predominance under Rule 23(b)(3)(D)").[3]

Moreover, while logistical case-management problems may be outweighed by other concerns, ascertainability may not. It bears directly on whether a class is capable of satisfying Rule 23(b)(3) and, as this Court has already correctly recognized, is properly resolved at the class-certification stage for a 23(b)(3) class. *See Shook v. El Paso Cnty.*, 386 F.3d 963, 972 (10th Cir. 2004) ("[L]ack of identifiability is a factor that may defeat Rule 23(b)(3) certification."); *Davoll*, 194 F.3d at 1146 (affirming denial of certification where identification of class members was not "administratively feasible").

Second, relegating the ascertainment of class membership to a post-trial process also violates the defendants' constitutional rights and

[3] This kind of overlap in the class-certification analysis is common. *E.g.*, 1 McLaughlin § 4:1 (explaining that "[g]enerally, the requirements of Rule 23(a) are interrelated"); *see also DZ Rsrv. v. Meta Platforms, Inc.*, 96 F.4th 1223, 1233 (9th Cir. 2024) (noting that "[t]he requirements of Rule 23(b)(3) overlap with the requirements of Rule 23(a)"); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008) ("T]here is some overlap among the certification criteria of commonality, Rule 23(a)(2), typicality, Rule 23(a)(3), and predominance, Rule 23(b)(3).").

the Rules Enabling Act. The defendants have a right to challenge the plaintiffs' evidence, including evidence of class membership. *Cf. Marcus*, 687 F.3d at 594 ("Forcing [the defendants] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications.").

This is especially true, where, as here, the question of class membership dovetails with an element of the plaintiffs' claims. For example, to succeed on their statutory consumer-protection claims, the plaintiffs must prove "actual damages" (App. Br. 56 (internal quotations and citation omitted).) As a result, they must prove that they actually purchased the relevant product to establish not only class membership, but also liability. The defendants have a due-process right to challenge that proof. *Carrera*, 727 F.3d at 307.

In addition, the defendants have a Seventh Amendment right to challenge that proof *before a jury*. *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018) (explaining that a claim administrator's "review of contested forms completed by consumers concerning an element of their

claims would fail to be protective of defendants' Seventh Amendment and due process rights" (internal quotations and citation omitted)). "The fact that plaintiffs seek class certification provides no occasion for jettisoning … the Seventh Amendment, or the dictate of the Rules Enabling Act, 28 U.S.C. § 2072(b)." *Id.* A "class cannot be certified on the premise" that defendants "will not be entitled to litigate … defenses to individual claims," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011), or to challenge "a plaintiff's ability to prove an element of liability," *Asacol Antitrust Litig.*, 907 F.3d at 53.

The plaintiffs and their amici[4] thus err in arguing that member-identification can be punted to the claims-administration stage. Ascertainability challenges cannot be avoided by deferring disputes over class membership to a post-trial claims-administration process. Rather, "[a] court that is not satisfied that the requirements of Rule 23

[4] *See* Amicus Curiae Brief of the National Consumer Law Center in Support of Plaintiffs-Appellants/Cross-Appellees ("NCLC Br.") 8, 12, 17-22; Brief of Amicus Curiae Public Citizen in Support of Plaintiffs-Appellants/Cross-Appellees ("PC Br.") 9-11.

have been met should refuse certification until they have been met." Fed. R. Civ. P. 23 advisory committee note to 2003 amendment.

In the end, this case is a prime example of why—at the certification stage—membership in a class must be ascertainable based on objective records not reasonably subject to dispute. The record here suggests that, collectively, the subclasses will include several million possible members. *See Santa Fe*, 2023 WL 6121894, at *14. Yet, as found by the district court, there is no objective method for establishing who did or did not actually purchase the relevant products. *Id*. at *109. It is thus a near certainty that whether any individual actually purchased the products at issue, and thus suffered any injury at all, will have to be determined on a case-by-case basis with potentially millions of mini-trials before a fact-finder, unless the defendants forgo their right to challenge claimants' proof. Either way, the class should not have been certified.

III. CERTIFYING UNASCERTAINABLE CLASSES HARMS AMERICAN BUSINESSES AND CONSUMERS.

The Court should reject the toothless version of ascertainability applied by the district court, as well as the even more ineffectual version espoused by the plaintiffs and their amici. Instead, the Court should clarify that, as explained above, ascertainability requires class members to be readily identifiable by objective criteria, *i.e.*, objective records not reasonably subject to dispute. *See, e.g., Niaspan Antitrust Litig.*, 67 F.4th at 133; *Krakauer*, 925 F.3d at 655, 658. The plaintiffs' alternative makes ascertainability all but meaningless, permitting class certification based on speculation that, at some future claims-administration stage, claimants will be able to convince an administrator, not a jury, that they are class members entitled to share in any recovery. Such improperly certified class actions harm American businesses and the entire economy.

Class certification is not merely "a game-changer," but "often the whole ballgame." *Marcus*, 687 F.3d at 591 n.2. Indeed, it will often create insurmountable pressure on defendants to settle. "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." *Coopers Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023) ("[T]he possibility of colossal liability can lead to what Judge Friendly called 'blackmail settlements.'" (quoting H. Friendly, Federal Jurisdiction: A General View 120 (1973)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n. 3 (2010) (Ginsburg, J., dissenting) (noting that class certification "places pressure on the defendant to settle even unmeritorious claims" because "a class action can result in 'potentially ruinous liability'" (quoting Fed. R. Civ. Proc. 23 advisory committee note)). As a result, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). A district court's duty to rigorously analyze the class-certification criteria is thus "not some pointless exercise." *Chavez v.*

Plan Benefit Servs., Inc., 957 F.3d 542, 547 (5th Cir. 2020). "It matters." *Id.*

Certifying classes that cannot be ascertained also puts a heavy thumb on the scale in favor of coercive settlements because it enables "no injury" classes such as the one here, defined by the mere purchase of a product and not by any actual harm suffered. *See* U.S. Chamber of Commerce Institute for Legal Reform, Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform 36 (Aug. 2022). Particularly where courts defer identifying class members until some undefined, post-trial claims-administration process, defendants are understandably skeptical that they will eventually be afforded a meaningful opportunity to weed out those who were not injured. Not surprisingly, when such overbroad classes are certified, defendants often opt to settle. *Id.* at 38. "Classwide settlements in such cases essentially offer free money to class members who would never be able to recover … individually against the defendant." *Id.* at 38-40; *see also TransUnion LLC v. Ramirez*, 594 U.S. 413, 433-34 (2021) (class

members lacked standing where they suffered no concrete harm from defendants' conduct).

Beyond that, certification of unascertainable classes contributes to the proliferation of fraudulent claims. According to a recent report, in 2023 more than 80 million class action and mass tort claims showed significant indicia of fraud. *See* Western Alliance Bank, 2024 Annual Report: Digital Payments in Class Action and Mass Torts 5 (Apr. 2024). This problem is particularly pronounced in "cases where claimants are not required to submit any proof of eligibility." *Id.*

Absent this Court's clarification of the proper ascertainability standard, the already immense pressure to settle even weak (or no-injury) class actions will increase exponentially. This harms the entire economy because the costs of defending and settling abusive class actions—which hit a record $3.9 billion in 2023[5]—are ultimately absorbed by consumers and employees through higher prices or lower wages, with little benefit to even those the class action was meant to

[5] *See* Carlton Fields, 2024 Carlton Fields Class Action Survey 6-7 (2024), archived at https://perma.cc/QVG2-G7X2 (captured May 29, 2024).

compensate. In fact, according to a study of 149 consumer class actions by the Federal Trade Commission, less than ten percent of class members even submit claims for compensation.[6]

CONCLUSION

This Court should reaffirm its existing precedent on ascertainability and clarify that this fundamental requirement of Rule 23 must be proved at the class-certification stage based on objective records that are not reasonably subject to dispute. In doing so, the Court should affirm the district court's denial of certification of certain subclasses and reverse certification of all other subclasses.

[6] Federal Trade Commission, FTC Staff Report, Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns 1, 11-12 (Sep. 2019), archived at https://perma.cc/UP74-ZB8M (captured May 30, 2024).

DATED: June 11, 2024

Respectfully submitted,

s/Frederick Yarger

Frederick R. Yarger
Galen D. Bellamy
Kate Fletcher
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Telephone: 303.244.1800
Facsimile: 303.244.1879
Email: yarger@wtotrial.com
bellamy@wtotrial.com
fletcher@wtotrial.com

Attorneys for Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(4)(G) because:

[X] this brief contains 4,727 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) 10th Cir. R. 32(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and 10th Cir. R. 32(A) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14 point font.

Dated: June 11, 2024

s/Frederick Yarger

Frederick R. Yarger
Galen D. Bellamy
Kate Fletcher
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Telephone: 303.244.1800
Facsimile: 303.244.1879
Email: yarger@wtotrial.com
bellamy@wtotrial.com
fletcher@wtotrial.com

Attorneys for Chamber of Commerce of the United States of America

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify, pursuant to the Court's CM/ECF User's Manual, that: (1) all required privacy redactions have been made pursuant to 10th Cir. R. 25.5; (2) the hard copies submitted to the Court are exact copies of the electronic submission; and (3) this electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: June 11, 2024

s/Frederick Yarger

Frederick R. Yarger
Galen D. Bellamy
Kate Fletcher
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Telephone: 303.244.1800
Facsimile: 303.244.1879
Email: yarger@wtotrial.com
bellamy@wtotrial.com
fletcher@wtotrial.com

Attorneys for Chamber of Commerce of the United States of America

CM/ECF CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS** was served on those listed below via the Tenth Circuit Court of Appeals' electronic email system this 11th day of June, 2024 to the following:

s/ Christine Keitlen
Christine Keitlen