No. 21-90044

In the United States Court of Appeals for the Fifth Circuit

DAMONIE EARL, et al.,
Plaintiffs-Respondents,
v.
THE BOEING COMPANY and SOUTHWEST AIRLINES CO.,
Defendants-Petitioners.

On petition for permission to appeal from the
United States District Court for the Eastern District of Texas
Hon. Amos L. Mazzant, District Judge
Case No. 4:19-cv-507

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONERS

Andrew R. Varcoe
Jennifer B. Dickey
U.S. CHAMBER LITIGATION CENTER
1615 H St NW
Washington, DC 20062
(202) 659-6000
avarcoe@uschamber.com

Scott A. Keller
Counsel of Record
LEHOTSKY KELLER LLP
919 Congress Ave
Austin, TX 78701
(512) 693-8350
scott@lehotskykeller.com

Steven P. Lehotsky
Jonathan D. Urick
LEHOTSKY KELLER LLP
200 Massachusetts Ave NW
Washington, DC 20001

Katherine C. Yarger
LEHOTSKY KELLER LLP
1550 Dayton St
Unit 362
Aurora, CO 80010

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

No. 21-90044

Earl, et al. v. The Boeing Company and Southwest Airlines Co.

The undersigned counsel of record certifies that, in addition to the persons and entities identified in the petitioners' certificates, the following listed persons and entities as described in Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification of recusal.

Amicus Curiae:

The Chamber of Commerce of the United States of America.

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

Counsel for Amicus Curiae:

Scott A. Keller
Lead Counsel
LEHOTSKY KELLER LLP
919 Congress Ave
Austin, TX 78701

Steven P. Lehotsky
Jonathan D. Urick
LEHOTSKY KELLER LLP
200 Massachusetts Ave NW
Washington, DC 20001

Katherine C. Yarger
LEHOTSKY KELLER LLP
1550 Dayton St
Unit 362
Aurora, CO 80010

Andrew R. Varcoe
Jennifer B. Dickey
U.S. CHAMBER
LITIGATION CENTER
1615 H St NW
Washington, DC 20062

Dated: September 24, 2021

/s/ Scott A. Keller
Scott A. Keller
Counsel of Record for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules and Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs, like this one, in cases that raise issues of concern to the nation's business community.

The Chamber has a strong interest in this case, which implicates the Article III prerequisites for standing and the Rule 23 prerequisites for certifying a class. American businesses routinely face putative class actions. Improperly certified no-injury class actions significantly harm businesses by pressuring them to settle even meritless claims. The Chamber thus has a vital interest, on behalf of its members and the broader business community, in ensuring that courts rigorously and consistently enforce Article III's standing requirements and Rule 23's class-certification requirements.

[1] No counsel for a party authored this brief in whole or in part, and no person other than the amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

SUMMARY OF THE ARGUMENT

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation omitted). Even so, class actions are certainly *not* an exception to the constitutional rules of Article III standing. "In an era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). Indeed, as this case shows, a plaintiff's continuing duty to establish standing throughout litigation has major implications for Rule 23's class-certification requirements where the standing inquiry raises individualized questions that will predominate over common issues.

The District Court unsuccessfully attempted to avoid predominance and ascertainability obstacles by redefining the class to purportedly require an economic burden as a condition of class membership. In the process, however, the court failed to conduct a "rigorous analysis" and improperly relieved the named plaintiffs of their burden to "affirmatively demonstrate" compliance with Rule 23 by punting unavoidably individualized standing questions to a post-judgment administration process. *See Comcast*, 569 U.S. at 35; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011). The District Court simply never required the named plaintiffs to "prove" at the class-certification stage that Article III standing and class membership could be adjudicated on a classwide basis without individualized questions

overwhelming common ones. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014).

This case thus urgently warrants this Court's review because the District Court's certify-now-worry-later approach fundamentally misunderstands how Article III standing interacts with Rule 23. If adopted by other courts, the District Court's analysis would introduce significant error into this Circuit's class-action jurisprudence, amplifying the coercive settlement pressure that abusive no-injury class actions already entail. Such class actions harm American businesses, employees, consumers, and the entire economy.

ARGUMENT

I. District courts must consider Article III standing at the class-certification stage.

"A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits . . . , leav[ing] the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.). As the Rules Enabling Act confirms, "use of the class device cannot 'abridge . . . any substantive right.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016) (quoting 28 U.S.C. § 2072(b)).

Class actions are thus no exception to Article III's general standing requirements. Article III limits the federal judiciary's role "to provid[ing]

relief to claimants, in individual *or class actions*, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (emphasis added). "[W]hen there are multiple plaintiffs" in a lawsuit, each plaintiff "must have Article III standing" to pursue "a money judgment." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). So as the Supreme Court recently explained, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (quotation marks omitted).

The District Court thus fundamentally misstated the law, wrongly declaring that only "the standing of the named plaintiffs, and not that of the absent class members, is implicated at class certification." *Earl v. Boeing Co.*, 2021 WL 4034514, at *9 (E.D. Tex. Sept. 9, 2021). Plaintiffs must maintain standing "at all stages" of a case and "must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation." *TransUnion*, 141 S. Ct. at 2208 (quotation marks omitted).

Class certification "is the critical act" rendering unnamed class members "subject to the court's power." *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 250 (5th Cir. 2020) (citation omitted). District courts thus may not certify a proposed class that includes identifiable members known to lack standing. Nor may district courts certify a class when it is clear from the nature of the claims, the proposed class definition, and the undisputed evidence at the class-certification stage that the proposed class could include

more than a trivial number of individuals who would ultimately be unable to establish standing. "[A] named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *see also Mazza v. American Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012); *Denney v. Deutsche BankAG*, 443 F.3d 253, 264 (2d Cir. 2006); *cf. Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020) (doubting that Article III permits certification of a class where "[c]ountless unnamed class members lack standing").

In addition, because everyone without standing must ultimately be excluded from the class, *see TransUnion*, 141 S. Ct. at 2208, the named plaintiffs must, at a minimum, establish at class certification that the process of identifying uninjured class members comports with Rule 23. District courts thus cannot defer standing considerations until final judgment. If "many claims of the absent class members" are "not justiciable," then "whether absent class members can establish standing" is "exceedingly relevant to the class certification analysis required by" Rule 23. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019). As in this case, questions of standing for unnamed class members may pose a "powerful problem under Rule 23(b)(3)'s predominance factor." *Id*. To ensure that individualized issues do not predominate, class members must be able to demonstrate standing at every stage of the litigation "through evidence that is common to the class." *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 194-95 (3d Cir. 2020).

The District Court accordingly erred at least twice: First, by certifying a class with identifiable members that indisputably lack standing. And second, by ignoring the predominance problems that arise from needing to weed out them and other uninjured class members.[2] At some level, the District Court seemed to recognize standing's implications for predominance, noting that "concerns regarding the standing of absent class members" fall "within the predominance analysis." *Earl*, 2021 WL 4034514, at *10. But the court never followed through on this observation. As Petitioners explain, the evidence already establishes that millions of putative class members lack standing, Boeing Pet. at 11-12; Southwest Pet. at 19-20, and further factual development will only reveal even more uninjured members. Far from rigorously analyzing the implications for predominance, however, the District Court failed to consider whether individualized standing questions will predominate over common questions. For example, the court ignored the need to exclude class members who could not have overpaid for flights because they purchased tickets under fixed-price contracts or who did not even fly on a MAX plane. As Petitioners explain, standing in this case presents numerous and complex individualized (and

[2] As Boeing explains in its Petition, the District Court's original error was accepting plaintiffs' "benefit of the bargain" standing theory, which this Court has already rejected. Boeing Pet. at 7-8 (noting all plaintiffs arrived safely and disclaim physical or emotional injury).

often disputed) factual questions. *See* Boeing Pet. at 15-16, 20-22; Southwest Pet. at 13-17, 19-23.

Ignoring these individualized standing issues, the District Court merely observed that, as redefined, the class does not "include individuals who were reimbursed." *Earl*, 2021 WL 4034514, at *24. As noted, the putative class presents individualized standing questions besides reimbursement. But regardless, the court's observation does not answer whether determining *which* class members were reimbursed will devolve into burdensome minitrials. This Court should grant permission to appeal and confirm that because a substantial number of class members "in fact suffered no injury," the class cannot be certified. *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018). Not only is that required by Article III, it is required by Rule 23 where, as here, the "need to identify" and exclude "those individuals will predominate." *Id.*; *see also Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013).

II. Plaintiffs must affirmatively prove ascertainability before class certification.

The ascertainability requirement is not some judge-made afterthought. On the contrary, ascertainability is "an essential element of class certification" necessarily "implied" and "encompassed" by many of Rule 23's provisions. 1 Newberg on Class Actions § 3:2 (5th ed.) (quotation marks omitted); *see John v. National Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir.

2007). "Implied" does *not* mean atextual. To the contrary, the ascertainability requirement logically flows from the rule's text. Ascertainability is not an *addition* to the requirements of Rule 23(b)(3); it is a textually grounded *application* of those express requirements. Named plaintiffs must affirmatively prove ascertainability at the class-certification stage just like every other requirement of Rule 23.

For damages class actions certified under Rule 23(b)(3), the ascertainability requirement flows at a minimum from the predominance and superiority requirements. Without a ready means of ascertaining who belongs to the proposed class, the named plaintiffs cannot show either that common questions will "predominate over any questions affecting only individual members," or that a class action will be "superior . . . for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Common questions will not predominate and the class-action device will be inferior because the litigation will get bogged down with individual disputes over class membership. Although a class can be ascertainable without satisfying predominance and superiority, the converse is not true: A class-action plaintiff cannot satisfy predominance and superiority unless class membership is ascertainable.

These legal roots explain some of ascertainability's implications for this case. For a class to be ascertainable in the sense relevant to predominance and superiority, the court must be able to determine class membership without recourse to debatable, individualized determinations

weighing conflicting evidence. As this Court has explained, ascertainability requires "objective criteria" to determine class membership. *Seeligson v. Devon Energy Prod. Co.*, 761 F. App'x 329, 334 (5th Cir. 2019) (per curiam); *accord* 1 McLaughlin on Class Actions § 4:2 (15th ed.) (McLaughlin).

In the ascertainability context, relying on objective criteria importantly does not mean, as the District Court suggested, simply avoiding inquiries into each class member's subjective "state of mind." *Earl*, 2021 WL 4034514, at *17 n.18. Rather, to satisfy ascertainability, class membership must be assessed based on existing, objective factual records that are *not reasonably subject to dispute*. Otherwise, determining class membership would require "conducting a mini-trial of each person's claim." McLaughlin § 4:2. "The touchstone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015) (quotation marks and citation omitted).

The District Court thus erred because class membership here cannot be ascertained through a streamlined, mechanical process using undisputed records. Determining each person's economic burden—and hence class membership—will require credibility judgments and weighing conflicting evidence from adverse potential class members disputing reimbursement. According to the District Court's *ipse dixit*, however, concerns about "the scope of the work involved in the claims-administration process," including determining class membership, simply do "not cause the putative classes to

fail for lack of ascertainability." *Earl*, 2021 WL 4034514, at *17. This analysis reflects a fundamental misunderstanding of that doctrine. A class is not ascertainable—and thus not certifiable—when identifying members would require costly individualized minitrials.

Contrary to the District Court's analysis, moreover, it is not *defendants'* job at the class-certification stage to "demonstrate that the classes Plaintiffs propose will be clearly *unascertainable*." *Id*. (emphasis added). Before class certification, the named plaintiffs must *prove* that class membership can be ascertained without burdensome minitrials. "[A] party cannot merely provide assurances to the district court that it will later meet Rule 23's requirements." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 164 (3d Cir. 2015). "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23 advisory committee note to 2003 amendment. The District Court's certify-now-worry-later approach not only violates Rule 23 but also the Due Process Clause and the Seventh Amendment, under which defendants must be "able to challenge class membership," *Carrera v. Bayer Corp.*, 727 F.3d 300, 309 (3d Cir. 2013), and contest every aspect of the Plaintiffs' case *at trial*, *TransUnion*, 141 S. Ct. at 2208; *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 625 (D.C. Cir. 2019).

III. Improperly certified class actions harm American businesses and the entire economy.

A district court's duty to rigorously analyze the class-certification criteria "is not some pointless exercise . . . It matters." *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 547 (5th Cir. 2020). Class certification is not merely "a game-changer," but "often the whole ballgame." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012).

As the District Court recognized, "class certification creates insurmountable pressure on defendants to settle." *Earl*, 2021 WL 4034514, at *9 (citation omitted). "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 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*, 559 U.S. at 445 n.3 (Ginsburg, J., dissenting) (same).

If other courts replicate the District Court's erroneous approach, the already immense pressure to settle improperly brought class actions will grow even further. This harms the entire economy, because businesses inevitably pass along the costs of defending and settling abusive class actions to consumers and employees through higher prices or lower wages.

CONCLUSION

The Court should grant the Rule 23(f) petitions for permission to appeal.

Dated: September 24, 2021

Respectfully submitted,

/s/ Scott A. Keller

Scott A. Keller
Counsel of Record
LEHOTSKY KELLER LLP
919 Congress Ave
Austin, TX 78701
(512) 693-8350
scott@lehotskykeller.com

Steven P. Lehotsky
Jonathan D. Urick
LEHOTSKY KELLER LLP
200 Massachusetts Ave NW
Washington, DC 20001

Katherine C. Yarger
LEHOTSKY KELLER LLP
1550 Dayton St
Unit 362
Aurora, CO 80010

Andrew R. Varcoe
Jennifer B. Dickey
U.S. CHAMBER LITIGATION CENTER
1615 H St NW
Washington, DC 20062
(202) 659-6000
avarcoe@uschamber.com

Counsel for Amicus Curiae

CERTIFICATE OF CONFERENCE

Counsel for amicus curiae the Chamber of Commerce of the United States of America conferred with counsel for Plaintiffs-Respondents and Defendants-Petitioners, who advised that Plaintiffs-Respondents and Defendants-Petitioners do not oppose the Chamber's filing of this amicus curiae brief.

/s/ Scott A. Keller
Scott A. Keller

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,600 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

/s/ Scott A. Keller
Scott A. Keller

CERTIFICATE OF SERVICE

On September 24, 2021, this brief was transmitted to the Clerk of the Court via CM/ECF and served on all registered counsel. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Scott A. Keller
Scott A. Keller