No. 21-40720

In the United States Court of Appeals for the Fifth Circuit

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

On 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 APPELLANTS

Tara S. Morrissey
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H St NW
Washington, DC 20062
(202) 659-6000
tmorrissey@uschamber.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

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

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

No. 21-40720

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 appellants' 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

Tara S. Morrissey
Tyler S. Badgley
U.S. CHAMBER
LITIGATION CENTER
1615 H St NW
Washington, DC 20062

Dated: January 14, 2022

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

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 in cases, like this one, 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) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). Even so, class actions are certainly *not* an exception to the constitutional rules of Article III standing. "In an era of frequent litigation"—and especially "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. Despite its constitutional duty to assure that *all* plaintiffs have and maintain Article III standing at every stage of a case, the District Court only considered the standing of absent class members as relevant to predominance—and then still failed to rigorously analyze standing even in that narrow frame.

The District Court also unsuccessfully attempted to avoid predominance and ascertainability obstacles by requiring an economic burden as a condition of class membership, as Plaintiffs had proposed. 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 and class-membership questions to a post-judgment claims-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 Court should confirm that this burden flows from both Article III and Rule 23. In particular, the Court should make especially clear that the ascertainability requirement is not some second-tier, judge-made rule but is a full-blown prerequisite for class-certification rooted in multiple provisions of Rule 23.

The District Court's certify-now-worry-later approach to standing and ascertainability fundamentally misunderstands how Article III standing interacts with Rule 23. If allowed to stand, the District Court's analysis would amplify 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 the Article III standing of absent class members at the class-certification stage.

Article III prohibits a federal court from awarding relief to persons without standing and, when applied in the context of Rule 23, does not

permit a federal court to certify a class that includes more than a de minimis number of persons who lack standing. 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.*, --- F.R.D. ----, 2021 WL 4034514, at *9 (E.D. Tex. Sept. 9, 2021).

A. Article III standing requirements apply to class actions.

Concrete injury in fact is an essential element of the "'irreducible constitutional minimum'" of Article III standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Although the named plaintiffs assert claims under the Racketeer Influenced and Corrupt Organizations Act, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 341. Bare statutory violations do not suffice. *Id.* at 341-42; *accord Thole v. U. S. Bank N.A*, 140 S. Ct. 1615, 1620-21 (2020). To be "concrete," the injury "must actually exist"—it must be "real," rather than "abstract." *Spokeo*, 578 U.S. at 340. As the parties invoking federal subject-matter jurisdiction, plaintiffs must plead and ultimately prove that they have suffered such a concrete injury. *Lujan*, 504 U.S. at 561. Standing is "an indispensable part of [a] plaintiff's case." *Id.*

As a constitutional prerequisite to federal jurisdiction, "[t]he Article III standing requirements apply equally to class actions." *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570 (6th Cir. 2005); *see also Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d

917, 924 (11th Cir. 2020) (en banc). The class-action device "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326, 332 (1980). "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)). Besides the Constitution, that statutory command "is the ever-antecedent and overarching limitation on class-action litigation." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *see also* Fed. R. Civ. P. 82 (instructing that the "rules do not extend . . . the [subject-matter] jurisdiction of the [United States] district courts"). "[N]o reading of the Rule can ignore the Act's mandate that 'rules of procedure shall not abridge, enlarge or modify any substantive right.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (quoting *Amchem*, 521 U.S. at 613); *accord American Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (rejecting interpretation of Rule 23 that would unlawfully modify substantive rights).

As a result, Article III and the Rules Enabling Act limit 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). Precisely because "standing is not dispensed in gross," every class member must have Article III standing to recover individual damages. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). "'Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.'" *Id.* (quoting *Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring)); *see also Allen v. Wright*, 468 U.S. 737, 750 (1984) (discussing standing requirement in class-action context); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006) (same).

B. A proposed class with identifiable members known to lack standing raises constitutional concerns.

Although the Supreme Court in *TransUnion* did not ultimately address "whether every class member must demonstrate standing before a court certifies a class," its reasoning makes clear that, at a minimum, the potential presence of uninjured parties in a certified class raises serious questions under Article III. 141 S. Ct. at 2208 n.4, 2214 (remanding for district court to consider "whether class certification is appropriate in light of our conclusion about standing").

Putting aside standing's implications for predominance and Rule 23's other certification criteria, *see infra* at 9-15, constitutional concerns over standing arise at the class-certification stage for two reasons. *First*, "[c]lass certification is the thing that gives an Article III court the power to 'render dispositive judgments' affecting unnamed class members." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 770 (5th Cir. 2020) (Oldham, J., concurring) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)); *see also Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (unnamed class members are not "part[ies] to the class-action litigation *before the class is certified*") (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting)); *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 250 (5th Cir. 2020) (class certification "is the critical act" rendering unnamed class members "subject to the court's power"); *cf. Devlin*, 536 U.S. at 10-11 (holding that absent class members are considered parties for purposes of appeal because they are bound by the judgment). *Second*, under Article III, 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 (quoting *Lujan*, 504 U.S. at 561); *see also Davis v. FEC*, 554 U.S. 724, 732-33 (2008); *Flecha*, 946 F.3d at 770 (Oldham, J., concurring).

Before certifying a class, and thereby exercising jurisdiction over the merits of the claims of absent class members, the district court must ensure that it has a basis to do so. "Standing is an inherent prerequisite to the class

certification inquiry." *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001).

Multiple appellate courts have accordingly concluded that "no class may be certified that contains members lacking Article III standing." *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (quoting *Denney*, 443 F.3d at 264); *see also Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision."); *Denney*, 443 F.3d at 264 (2d Cir. 2006) (same); 7AA Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1785.1 (3d ed.) ("Wright & Miller") ("[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention."); *cf. Flecha*, 946 F.3d at 768 (expressing skepticism that Article III permits certification of a class where "[c]ountless unnamed class members lack standing"). In short, "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).

This Court should likewise hold that district courts may not certify a proposed class that includes identifiable, uninjured class members *known* to lack standing. Here, class certification runs afoul of Article III because millions of members lack standing as they did not even fly on a Boeing 737

MAX 8—*95% of the entire class*. Boeing Br. at 25-28. That defect is inherent in the class definition (and Plaintiffs' entire benefit-of-the-bargain theory, for that matter). As a result, this is not a situation where the class definition ensures that each member presumptively has standing even though some small portion of unknown members may ultimately be unable to prove it. Appellants' undisputed business records confirm that the vast majority of the proposed class lack standing as a matter of law.

C. A proposed class with more than a de minimis number of unknown members without standing may not be certified.

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 unknown members who would ultimately be unable to establish standing. In addition to raising Article III concerns, 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).

At the outset of a putative class action, many of the members of the proposed class may be unknown, or even if they are known, the facts bearing on their claims—including their Article III standing—may not be. *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). 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 without standing comports with Rule 23.

Rule 23 "imposes stringent requirements for certification that in practice exclude most claims." *American Exp.*, 570 U.S. at 234. Damages class actions under Rule 23(b)(3) are an especially "'adventuresome innovation' . . . designed for situations 'in which class-action treatment is not as clearly called for.'" *Comcast*, 569 U.S. at 34 (quoting *Wal-Mart*, 564 U.S. at 362); *see also Amchem*, 521 U.S. at 614. As a result, Rule 23 includes additional "procedural safeguards" for such class actions, including "the court's duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast*, 569 U.S. at 34 (quoting *Amchem*, 521 U.S. at 615). The "mission" of this "demanding" predominance requirement—which winnows out proposed class actions in which the members' claims cannot be adjudicated without burdensome individualized assessments—is to "assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623-24.

That cohesion exists only when all class members "'possess the same interest and suffer the *same injury*.'" *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (emphasis added) (quoting *Schlesinger v. Reservists Comm. to Stop War*, 418 U.S. 208, 216 (1974)). The named plaintiffs' burden to affirmatively prove predominance by establishing a common,

classwide injury ensures "sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 621.

Standing is thus a key part of the required predominance analysis. As in this case, questions of standing for unnamed class members may pose a "powerful problem under Rule 23(b)(3)'s predominance factor." *Cordoba*, 942 F.3d at 1273 (vacating class certification because district court failed to address standing's implications for predominance). If a substantial number of class members "in fact suffered no injury," the "need to identify those individuals will predominate" and prevent class certification. *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018); *see Moore v. Apple Inc.*, 309 F.R.D. 532, 542 (N.D. Cal. 2015) ("[T]he inclusion of class members whom, by definition, could not have been injured is . . . indicative of the individualized inquiries that would be necessary to determine whether a class member has suffered any injury in the first place.").

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). If injury cannot be proved or disproved through such common evidence, then "individual trials are necessary to establish whether a particular [class member] suffered harm from the [alleged misconduct]," making class treatment under Rule 23 inappropriate. *In re Rail Freight Fuel Surcharge*

Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013); *see also Tyson Foods*, 136 S. Ct. at 1045.

A class may not be certified if, at a minimum, there is a possibility of more than a de minimis number of uninjured class members, or if weeding out uninjured members will require individualized adjudication. Certifying a class that contains more than a de minimis number of potentially uninjured plaintiffs cannot be squared with Rule 23's predominance requirement. So even assuming that the Constitution sometimes allows the certification of classes with a de minimis number of uninjured members without standing, Article III and Rule 23 limit this de minimis rule to cases where (a) the uninjured class members are unidentified, and (b) the process of identifying them will not require burdensome, individualized mini-trials. If it is apparent at the class-certification stage that the proposed class includes more than a handful of uninjured members who could not individually pursue their claims in federal court, those same individuals should not be permitted to assert their claims through the expedient of the class device. *See, e.g.*, *Halvorson*, 718 F.3d at 779-80; *In re Asacol*, 907 F.3d at 53-54.

The District Court erred by ignoring the predominance problems that arise from needing to weed out known and unknown class members without standing.[2] At some level, the District Court seemed to recognize standing's

[2] As Boeing explains in its opening brief, the District Court's original error was accepting plaintiffs' "benefit of the bargain" standing theory, which this

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, and therefore never conducted the rigorous inquiry required at class certification. It failed to consider whether individualized questions regarding injury will predominate over common ones. As Appellants explain, the allegations and evidence already establish that millions of putative class members lack standing, Boeing Br. at 25-28; Southwest Br. at 17-20, and further factual development will only reveal even more uninjured members. Standing in this case presents numerous and complex individualized (and often disputed) factual questions. Indeed, some of these individualized factual issues overlap with those regarding injury and damages that this Court already identified as likely obstacles to predominance. *See Earl v. Boeing Co.*, No. 21-40720, --- F.4th ----, 2021 WL 6061767, at *2 (5th Cir. Dec. 22, 2021) (granting stay of discovery because of "substantial predominance questions" surrounding alleged ticket overcharge); *see also* Boeing Br. at 50-51; Southwest Br. at 23-27, 34-44. The District Court nevertheless ignored, for example, 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.

Court has already rejected. Boeing Br. at 17-25 (noting all plaintiffs arrived safely and disclaim physical or emotional injury).

Because litigating these individualized standing issues for millions of plaintiffs on a classwide basis is impossible, class certification will inevitably compromise Defendants' right to raise individual defenses under the Due Process Clause, the Seventh Amendment, and the Rules Enabling Act. Boeing Br. at 32-33; Southwest Br. at 54-55. Defendants have a fundamental due process right to "present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *American Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). "The right to be heard must necessarily embody a right to . . . raise relevant issues," *Holt v. Virginia*, 381 U.S. 131, 136 (1965), and must allow the defendant to "test the sufficiency" of the plaintiff's case by offering "evidence in explanation or rebuttal," *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93 (1913); *Saunders v. Shaw*, 244 U.S. 317, 319 (1917); *see also Bell v. Burson*, 402 U.S. 535, 542 (1971). As a result, "a class cannot be certified on the premise that [defendants] will not be entitled to litigate . . . defenses to individual claims." *Wal-Mart*, 564 U.S. at 367.

Ignoring the many 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. But redefining the class this way addresses none of the above problems. As noted, the putative class presents individualized standing questions besides reimbursement. And the court's observation about reimbursement does not answer whether determining *which* class members were reimbursed will devolve into burdensome minitrials. *See* Boeing Br. at 29, 34-35. So not only does Article

III prohibit certifying a class with more than a de minimis number of class members without standing, Rule 23 does as well where, as here, the "need to identify" and exclude "those individuals will predominate." *In re Asacol*, 907 F.3d at 53.

II. District courts cannot defer ascertainability concerns to a post-trial claims-administration process.

Although the District Court nominally applied the ascertainability requirement, it found that requirement satisfied only by improperly deferring identification of class members to an unmanageable post-trial claims-administration process. The District Court also wrongly shifted the burden to defendants to prove at class certification that class membership would *not* be ascertainable at some point. This certify-now-worry-later approach reflects a fundamental misunderstanding of ascertainability, treating it as a weaker, second-tier requirement and failing to conduct the rigorous analysis required *before* a class may be certified. This Court should clarify the textual basis for the ascertainability requirement, and its resulting scope, so as to ensure that district courts apply it correctly.

A. Rule 23 requires an ascertainable class.

Ascertainability is a threshold requirement and "an 'essential' element of class certification" necessarily "implied" and "encompassed" by Rule 23's text. 1 Newberg on Class Actions § 3:2 (5th ed.) ("Newberg") (quotation marks omitted); *see John v. National Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007). "Implied" thus does *not* mean atextual. Ascertainability is not an

addition to the requirements of Rule 23(b)(3); it is a textually grounded *application* of those express requirements.

The ascertainability requirement logically flows from many of Rule 23's provisions. For starters, the rule's repeated use of the word "class" leaves no doubt that the existence of an actual, identifiable "class" is "an essential prerequisite" for class certification. 7A Wright & Miller § 1760. More fundamentally, unless absent class members are identifiable, a court cannot perform the required rigorous analysis of Rule 23's specific criteria and a defendant cannot effectively litigate its individualized defenses.

District courts cannot determine whether a proposed class satisfies Rule 23(a)'s general criteria without a way to identify absent class members. *See* 1 Newberg § 3:2. For example, a court cannot determine whether the proposed class's claims present "questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), unless it first determines that the "class members 'have suffered the same injury.'" *Wal-Mart*, 564 U.S. at 350 (quoting *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Evaluating the injuries of absent class members is impossible unless the court can identify who is properly part of the class. Only then can a court determine—as Rule 23(a) expressly requires—whether common questions will generate "common *answers* apt to drive the resolution of the litigation." *Id.* at 350, 356-57 (citation omitted).

The ascertainability requirement also flows from Rule 23(c). Rules 23(c)(1) and (2) require a court certifying a class to issue an "order" that

"define[s] the class and the class claims, issues, or defenses" and issue 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). Courts have accordingly read Rule 23(c) to "contain the substantive obligation that the class being certified be ascertainable." 1 Newberg § 3:2 (collecting cases).

The ascertainability requirement is particularly important in connection with Rule 23(c)'s provisions pertaining to opt-out rights for putative members of class actions seeking damages. Due process considerations aside, Rule 23(c) requires courts to provide the "best notice that is practicable under the circumstances," directing that notice to "all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974) (individual notice to class members identifiable through reasonable effort is mandatory in Rule 23(b)(3) actions and this requirement may not be relaxed based on high cost). But a court cannot determine the "best notice" without a meaningful upfront effort to ascertain the class's actual members. 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 v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

The requirement that a class be ascertainable also effectuates Rule 23(c)'s command that class judgments bind absent members "whether or not favorable to the class." Fed. R. Civ. P. 23(c)(3); *see* Fed. R. Civ. P. 23(c)(2)(B)(vii) (Rule 23(b) classes have a "binding effect" on class members).

When a class is not readily ascertainable, it creates the risk that a class would never be bound by an adverse judgment. In such cases, the absent class members are not ascertainable until liability is established because the class's very existence depends on the class's winning. The surest way to ensure that class judgments bind absent class members—"[w]hether or not" the judgment is "favorable to the class," Fed. R. Civ. P. 23(c)(3)—is to apply a meaningful ascertainability test at the certification stage.

Most importantly, however, for damages class actions like this one, the ascertainability requirement also flows from Rule 23(b)(3)'s predominance and superiority requirements. Without a ready means of ascertaining who belongs to the proposed class, the named plaintiffs cannot show that common questions will "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Nor could plaintiffs show that a class action will be "superior to other available methods for fairly and efficiently adjudicating the controversy," taking account of "the likely difficulties in managing a class action." *Id.*

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. "Courts properly look below the surface of a class definition to determine whether the *actual process of ascertaining* class membership will necessitate delving into individualized or subjective determinations." 1 McLaughlin on Class Actions § 4:2 (16th ed.) ("McLaughlin") (emphasis added); *see also Marcus*, 687 F.3d at 591 (holding

that ascertainability is part of Rule 23(b)(3)'s predominance requirement); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (holding that class certification is inappropriate if identifying class members requires "extensive and individualized fact-finding" (internal quotation marks omitted)). 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.

B. A class is ascertainable only when membership depends on factual records not reasonably subject to dispute.

Because ascertainability flows in part from Rule 23(b)(3)'s predominance and superiority requirements, its implications for this case are clear. 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 § 4:2 ("a Rule 23(b)(3) class must be presently ascertainable based on objective criteria"). "Objective criteria" means records not reasonably subject to dispute. That standard reflects the function of the ascertainability requirement: The presence or absence of the requisite records determines whether a class action is genuinely "superior" and whether common

questions will in fact "predominate" over individualized inquiries into class membership. Fed. R. Civ. P. 23(b)(3).

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 District Court thus erred because class membership here cannot be ascertained through a streamlined, mechanical process using undisputed records. As Plaintiffs proposed, the court limited the class to "the bearer[s] of the ultimate economic burden for a ticket." *Earl*, 2021 WL 4034514, at *24 (internal quotation marks omitted). But 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. "[W]here 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; *accord Martin v. Pacific Parking Sys. Inc.*, 583 F. App'x 803, 804 (9th Cir. 2014) (holding that "the proposed class was not ascertainable because there was no reasonably efficient way to determine which of the hundreds of thousands of individuals who used the parking lots 'used a personal credit or debit card,

rather than a business or corporate card,' to purchase parking" (citation omitted)).

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 the ascertainability requirement. A class is not ascertainable—and thus not certifiable—when identifying members would require costly individualized minitrials. Ascertainability challenges cannot be avoided by deferring disputes over class membership to a post-trial claims-administration process. Rule 23 requires that "members of the class . . . be identified before trial on the merits." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974); *see* Boeing Br. at 30-32. A post-trial identification process also violates the Constitution and the Rules Enabling Act. *Id.* at 32-33; *see also* Southwest Br. at 51-56; *supra* at 14.

C. Plaintiffs must affirmatively prove ascertainability at the class-certification stage.

Because ascertainability is a threshold requirement of class certification, it remains the named plaintiffs' burden at the class-certification stage to "'affirmatively demonstrate'" that class members can be identified without burdensome individualized adjudication, and courts must "conduct a 'rigorous analysis' to determine whether" the plaintiffs have carried that

burden. *Comcast*, 569 U.S. at 33, 35 (quoting *Wal-Mart*, 564 U.S. at 350-51); *see also Halliburton*, 573 U.S. at 275 (plaintiffs "must actually prove—not simply plead—that their proposed class satisfies each requirement of Rule 23"); *Falcon*, 457 U.S. at 160 ("actual, not presumed, conformance" with Rule 23 "remains . . . indispensable"); *In re Rodriguez*, 695 F.3d 360, 365 (5th Cir. 2012) ("The party seeking class certification bears the burden of demonstrating that the requirements of Rule 23 have been met.").

The District Court improperly relieved plaintiffs of their burden to prove ascertainability at class certification, shifting to defendants the burden to "demonstrate that the classes Plaintiffs propose will be clearly *unascertainable* at some stage of the[] proceedings." *Earl*, 2021 WL 4034514, at *17 (emphasis added). But "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). The District Court's certify-now-worry-later approach violates Rule 23. "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.

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 . . . [i]t 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*, 687 F.3d at 591 n.2.

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) (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, "[e]ven 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).

Virtually all certified class actions "end in settlement" before trial. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (Dec. 2010). Indeed, in 2019, companies reported settling 60.3% of class actions, and they settled an even

higher 73% the year before. *See* 2020 Carlton Fields Class Action Survey 29, https://bit.ly/2WDSTEP.

Class-action litigation costs in the United States are huge. They totaled a staggering $2.64 billion in 2019, continuing a rising trend that started in 2015. *Id.* at 4. The cost to defend a single large class action can run into nine figures. *See* Adeola Adele, Dukes v. Wal-Mart*: Implications for Employment Practices Liability Insurance* 1 (July 2011) (noting defense cost of $100 million). And such actions can drag on for years even before a court takes up the question of class certification. *See* U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, at 1 (Dec. 2013), http://bit.ly/3rrHd29 ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis.").

Enforcing Article III's requirements at the class-certification stage ensures that parties do not needlessly expend time and money—and defendants are not faced with unwarranted settlement pressure—litigating a certified class action through trial only for a court to conclude at final judgment that significant portions of the certified class lack standing. Moreover, even assuming (contrary to significant evidence) that class-action settlements theoretically benefit class members and society, those benefits are only achieved if members can be ascertained to receive their share. Certifying classes that cannot be ascertained only disincentivizes efficient

settlements and incentivizes coercive ones. If the District Court's erroneous approach stands, the already immense pressure to settle improperly brought class actions will grow even further. This harms the entire economy, because the costs of defending and settling abusive class actions are ultimately absorbed by consumers and employees through higher prices or lower wages.

CONCLUSION

The Court should dismiss this case for lack of standing, or, alternatively, reverse the District Court's class-certification order.

Dated: January 14, 2022

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

Tara S. Morrissey
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H St NW
Washington, DC 20062
(202) 659-6000
tmorrissey@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 Defendants-Appellants, who advised that Plaintiffs-Appellees and Defendants-Appellants mutually agreed to blanket consent to all amicus curiae briefs on appeal for purposes of Federal Rule of Appellate Procedure 29(a)(2). No party opposes 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 5,989 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). No paper copies of this brief are being filed because the requirement to file paper copies remains suspended under Fifth Circuit General Docket Order No. 2020-3 due to the ongoing COVID-19 pandemic.

/s/ Scott A. Keller
Scott A. Keller

CERTIFICATE OF SERVICE

On January 14, 2022, 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