Nos. 23-2180 & 23-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANTHONY DUNN, ET AL.,

Plaintiffs-Appellants/Cross-Appellees,

v.

SANTA FE NATURAL TOBACCO COMPANY, 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 AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, the undersigned counsel certifies that amicus curiae Public Citizen is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues involving protecting consumers and workers, public health and safety, and maintaining openness and integrity in government.

Public Citizen believes that class actions are an essential tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, a class action offers the best means for individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process. Public Citizen has often participated as amicus curiae in cases involving issues concerning class action standards and requirements.

[1] All parties have consented to the filing of this amicus brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amicus made a monetary contribution to the preparation or submission of this brief.

Here, Public Citizen submits this amicus brief to explain that Rule 23 does not contain a threshold requirement of administrative feasibility, contrary to Defendants' suggestion otherwise. *See* Defs.' Rule 23(f) Pet. 16. Such a requirement has no basis in the text of Rule 23 and would doom a great many consumer class actions. This Court should join the majority of courts of appeals to have considered the issue in rejecting the notion that a prerequisite of administrative feasibility should be grafted onto the rigorous requirements of Rule 23.

ARGUMENT

Class certification under Rule 23 is premised on the existence of a clearly defined class, based on objective criteria. *See Moore's Federal Practice* § 23.21[1] (3d ed. 1997) (stating that "a class must exist" and "must be susceptible of precise definition"); Wright & Miller, *Federal Practice and Procedure* § 1760 (4th ed. 2023) (Rule 23 presumes "that there must be a 'class'"). And in examining the definiteness of the class, courts have "focus[ed] on the question of whether the class can be ascertained by objective criteria." *Newberg & Rubenstein on Class Actions* § 3:3 (6th ed. 2023). A clear and objective definition enables courts to identify who is bound by a judgment, as Rule 23(c)(3)(A)

requires, and thus to enforce the res judicata effect of a final judgment against the class members as well as defendants.

At the same time, the requirement that the class can be ascertained based on objective criteria does not mean that each class member must be individually identifiable at the time of class certification. *See Hargrove v. Sleepy's LLC*, 974 F.3d 467, 479 (3d Cir. 2020); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017); *Brecher v. Republic of Arg.*, 806 F.3d 22, 25 n.2 (2d Cir. 2015) (quoting 1 *McLaughlin on Class Actions* § 4:2 (11th ed. 2014) ("The class need not be so finely described, however, that every potential member can be specifically identified at the commencement of the action; it is sufficient that the general parameters of membership are determinable at the outset.")); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014).

In *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), the Third Circuit adopted a heightened ascertainability standard, requiring plaintiffs to show in support of class certification both that "the class is 'defined with reference to objective criteria,'" and that "there is 'a reliable and administratively feasible mechanism for determining whether

putative class members fall within the class definition.'" *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015). The Third Circuit, however, has since been careful to limit *Carrera* to its facts. *See Kelly v. RealPage Inc.*, 47 F.4th 202, 224 (3d Cir. 2022); *Hargrove*, 974 F.3d at 480; *Byrd*, 784 F.3d at 165.

Meanwhile, the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have considered and rejected the notion that an administratively feasible method for identifying every class member is a prerequisite to class certification. *See Cherry v. Dometic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021); *In re Petrobras Sec.*, 862 F.3d 250, 264 (2d Cir. 2017); *Briseno*, 844 F.3d at 1133; *Sandusky Wellness Ctr., LLC v. MedTox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins*, 795 F.3d at 658. This Court should join the numerous courts of appeals in ruling that administrative feasibility is not a prerequisite to class certification under Rule 23.

I. Rule 23 does not include a threshold administrative feasibility requirement.

The Supreme Court has instructed that Rule 23 "sets the requirements [the courts] are bound to enforce" when considering class

certification. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The text of the Rule "limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered." *Id*.

Rule 23(a), titled "Prerequisites," does not include "administrative feasibility." The Rule lists "four threshold requirements applicable to all class actions." *Amchem*, 521 U.S. at 613. The four threshold requirements—numerosity, commonality, typicality, and adequacy of representation—are exclusive. Under the "well-established canon of statutory construction"—"expressio unius est exclusio alterius"—the enumeration of four requirements implies the "exclu[sion] [of] another left unmentioned." *Navajo Nation v. Dalley*, 896 F.3d 1196, 1213 (10th Cir. 2018) (quoting *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017)). Because administrative feasibility is not listed among Rule 23(a)'s list of exclusive prerequisites, it is not a prerequisite to class certification under the Rule. *Briseno*, 844 F.3d at 1125–26.

Likewise, a heightened ascertainability requirement cannot be located in the Rule 23(b)(3) factors. "Nothing in Rule 23 mentions or implies this heightened [ascertainability] requirement under Rule 23(b)(3), which [would have] the effect of skewing the balance that

district courts must strike when deciding whether to certify classes." *Mullins*, 795 F.3d at 658. Instead, the administrative feasibility of identifying class members is one factor subsumed within the requirement that a Rule 23(b)(3) class action must be superior to individual adjudication, considering, among other things, the relative fairness and efficiency of class proceedings in light of a number of relevant considerations, some examples of which are set forth in the Rule. *See* Fed. R. Civ. P. 23(b)(3)(A)–(D). A court's consideration of these factors entails a flexible balancing of sometimes competing considerations, not a rigid elevation of a single consideration above all others. *Mullins*, 795 F.3d at 658; *see In re Petrobras Sec.*, 862 F.3d at 268.

An administrative feasibility prerequisite is also contrary to the policies underlying Rule 23. When a company exposes many people to the same unlawful practice, a class action is often the only effective way to redress the wrongdoing. As the Supreme Court has observed, "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). "The policy at the very core of the class action mechanism is to overcome [this]

problem." *Id*. "The smaller the stakes to each victim of unlawful conduct, the greater the economies of class action treatment and the likelier that the class members will receive some money rather than (without a class action) probably nothing." *Hughes v. Kore of Ind. Enter., Inc*., 731 F.3d 672, 675 (7th Cir. 2013). In such cases, class actions offer the only means for achieving individual redress and deterrence of wrongful conduct.

II. The district court's approach, if affirmed, would harm consumers without advancing any legitimate countervailing interest.

The focus of a legitimate ascertainability inquiry is a clear class definition based on objective criteria. *Newberg & Rubenstein on Class Actions* § 3:2; *Moore's Federal Practice* § 23.21[1]. A class, so defined, that satisfies the threshold standards set forth in Rule 23(a)(2), as well as Rule 23(b)(3)'s additional requirements that common issues predominate and that class resolution is superior to individual litigation, is entitled to be certified. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 399 (2010).

Consideration of "administrative feasibility" as a requirement for class certification is incompatible with "the careful balance struck in Rule 23." *In re Petrobras Sec.*, 862 F.3d at 268. Below, the district court

concluded that "administrative feasibility concerns tilt against a conclusion that the [proposed classes] satisfy predominance," *In re: Santa Fe Nat. Tobacco Co. Mktg. & Sales Pracs. & Prods. Liab. Litig.*, 2023 WL 6121894, at *129 (D.N.M. Sept. 19, 2023), stating that, among other things, there were "difficulties in determining whether an individual purchased [Defendants'] cigarettes," *id.* at *133. In so doing, the court rejected plaintiffs' assertion that they could rely on "sworn affidavits, claim forms, receipts, or purchase records" to prove class membership, citing the absence of "a method or model … to screen affidavits for authenticity," and stating that it was "unlikely that the proposed class members will have retained purchase records." *Id.* at *109. These concerns do not support the court's denial of certification of the clearly defined proposed classes that were based on the safer-cigarette theory. Moreover, if adopted, the district court's approach would make it impossible for many people injured by deceptive marketing or defective products to obtain relief, would eliminate an important deterrent of illegal conduct, and yet would do nothing to protect the legitimate interests of absent class members or defendants.

A. Affidavits are a well-established and reliable form of proof in civil litigation that offer a feasible means of allowing class members to come forward to identify themselves, subject to reasonable verification measures. "Given that a consumer's affidavit could force a liability determination at trial without offending the Due Process Clause," there is "no reason to refuse class certification simply because that same consumer will present her affidavit in a claims administration process after a liability determination has already been made." *Briseno*, 844 F.3d at 1132; *see Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 91 n.2 (2d Cir. 2018) ("Since we think it is more likely that a consumer would remember the time frame in which he purchased a bath or wash for his baby—that is, when his child was still a baby—than when he purchased a bottle of olive oil, we see no ascertainability problem with having the class members submit sworn affidavits describing the circumstances under which the purchases were made."); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458 (2016) (explaining in the context of representative evidence that "[t]he underlying question … [is] whether the [evidence] at issue could have been used to establish liability in an individual action"). Indeed, class member affidavits are proper

evidence to prove class membership even under the Third Circuit's heightened ascertainability requirement. *See Kelly*, 47 F.4th at 224 (stating that "'[a]ffidavits, in combination with records or other reliable and administratively feasible means,' could satisfy our ascertainability standard" (quoting *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 441 (3d Cir. 2017)). Moreover, here, this Court need not consider whether affidavits alone are sufficient, because as Plaintiffs explained, additional evidence likely exists that can provide a readily available check on the validity of any class member's self-identification. *See* Pls.-Appellants'/Cross-Appellees' Redacted Opening Br. 58.

In any event, concern about verifying class membership is distinct from ascertainability and is appropriately addressed after resolution of the merits, "when much more may be known about available records, response rates, and other relevant factors." *Mullins*, 795 F.3d at 664; *see id.* at 667. Verification of "claims forms by oath or affirmation" may be required in some circumstances, while in other situations additional "substantiation of claims," such as by invoices or other records, is appropriate. *Manual for Complex Litigation (Fourth)* § 21.66 (2004), at 331. In all cases, "documentation ... should be no more burdensome than

necessary." *Id*. Accordingly, the appropriate "[a]udit and review procedures ... depend on the nature of the case." *Id*. at 332. Large-claim cases "might warrant a field audit to check for inaccuracies or fraud," medium-sized claims may be subjected to "random sampling" audit inquiries, and small claims may be accepted on the basis of the sworn claim forms alone. *Id*.

Importantly, the *Manual for Complex Litigation*'s discussion of substantiating claims through affidavits comes in a discussion of implementation of class-action settlements, not in conjunction with "ascertaining" class members at the certification stage, which often comes first. *See also Byrd*, 784 F.3d at 165 (in a suit alleging damages from the installation of spyware on leased computers, reaffirming that "[t]he ascertainability inquiry is narrow"). This point underscores that where, as here, the class definition is clear, concerns about screening of claims—particularly those made by sworn affidavit—should not be used to scuttle class actions in their infancy. *See Briseno*, 844 F.3d at 1132. Rather, those concerns should be considered in case-management orders, *see* Fed. R. Civ. P. 23(d), or during the settlement or claims process, when

the court and the parties are best equipped to address potential fraud or inaccuracy.

The district court's approach—embedding administrative feasibility in Rule 23(b)(3) predominance and, at the same time, rejecting use of sworn affidavits and other adequate means of identifying class members—provides a way for companies to avoid accountability for unlawful practices: minimizing recordkeeping. As one court explained, allowing the contours of a class to be defined by defendants' own recordkeeping—"or declining to certify a class altogether, as defendants propose—would create an incentive for a person to … keep no records of its activity, knowing that it could avoid legal responsibility for the full scope of its illegal conduct." *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 250 (N.D. Ill. 2014); *see Daniels v. Hollister Co.*, 113 A.3d 796, 801–02 (N.J. App. 2015) ("Allowing a defendant to escape responsibility for its alleged wrongdoing by dint of its particular recordkeeping policies … is not in harmony with the principles governing class actions."); *see also Tyson Foods*, 577 U.S. at 456 (explaining that in Fair Labor Standards Act cases, "[i]nstead of punishing 'the employee by denying him any recovery'" where the employer has failed to keep

records, a court may allow the employee to present evidence sufficient to establish proof of a claim through "just and reasonable inference" (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946))); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (Sotomayor, J.) (holding that refusal to certify a class "on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule" (internal quotation marks omitted)).

B. A heightened "administrative feasibility" requirement at the certification stage is not needed to protect defendants' due process rights. Where class definitions are imprecise, the problem is identifying who is bound by a judgment. Here, however, the class definitions are clear and objective, and any class member who later tried to sue defendants over the allegedly deceptive representations would be bound by res judicata unless they could somehow collaterally attack the judgment on due process grounds. If the class notice comports with due process, such an attack would be meritless.

Moreover, our research has identified only a handful of reported decisions identifying successful collateral attacks on class-action judgments certified under Rule 23(b)(3). *See Stephenson v. Dow Chem.*

Co., 273 F.3d 249, 259–61 (2nd Cir. 2001), *aff'd by equally divided court,* 539 U.S. 111 (2003); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1223–24 (11th Cir. 1998); *Palmer v. Gentek Bldg. Prods., Inc.*, 936 N.W.2d 552, 559 (N.D. 2019). None of these collateral attacks involved a problem in "ascertaining" who was in the class or an assertion that some class members' interests had been "diluted by fraudulent or inaccurate claims"—a concern of the court in *Carrera*, 727 F.3d at 310. For these reasons, class-action defendants have no legitimate concern that, absent an extension of the ascertainability requirement, they will face collateral attacks on class-action judgments to which they are parties. The small number of successful collateral attacks shows that the risk of future successful collateral attacks is itself vanishingly small. This number appears even smaller in light of the number of class-action judgments potentially subject to collateral attack. That number is comparatively large, and many of those judgments involve relatively small claims arising under consumer protection, securities, and similar statutes that depend on the class-action device for their survival.[2] Given this large

[2] *See* Theodore Eisenberg et. al., *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. Rev. 937, 940–41 (2017) (finding 458 reported cases in conducting a study of "all class action cases reported during the

number of cases, if the concern about application of res judicata were correct, the courts would have been entertaining collateral attacks on class-action judgments for decades. Instead, there have been almost none.

In addition, although a defendant has a due process right to challenge the plaintiff's evidence at any stage of the case, including the claims or damages stage, this right is not impeded by use of affidavits to establish class membership, "subject as needed to audits and verification procedures and challenges, to identify class members." *Mullins*, 795 F.3d at 669. At the claims administration stage, parties have long relied on "claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court" to validate claims. *Id.* at 667, *quoted in Briseno*, 844 F.3d at 1130. "The due process question is

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2009–2013 period from which usable information on counsel fees could be obtained"); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 813 (2010) (study showing that "[d]istrict court judges approved 688 class action settlements" in 2006 and 2007); NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* at 1 (2016), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf (in federal securities class actions, federal district courts approved 108 class-action settlements in 2015).

not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward." *Mullins*,795 F.3d at 670.

To be sure, "[i]n all cases, the defendant has a right not to pay in excess of its liability and to present individual defenses, but both rights are protected by other features of the class device and ordinary civil procedure." *Id*. at 672. The advisory committee's notes confirm this point, explaining that certification may be proper "despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." Fed. R. Civ. P. 23 advisory committee's notes to 1966 amendment.

At bottom, the district court erred in letting "a quest for perfect treatment of one issue become a reason to deny class certification and with it the hope of any effective relief at all." *Mullins*, 795 F.3d at 662.

CONCLUSION

This Court should reverse the district court's decision denying certification of the safer-cigarette classes.

Respectfully submitted,

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March 11, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f) and the Rules of this Court, it contains 3,241 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Date: March 11, 2024

s/ Wendy Liu
Wendy Liu

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that, 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 this electronic submission; and (3) this electronic submission has been scanned for viruses by Sophos Endpoint (version 2023.2.2.1, last updated March 7, 2024), and according to that program, is free of viruses.

Date: March 11, 2024

s/ Wendy Liu
Wendy Liu