No. 22-1744(L)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE: MARRIOTT INTERNATIONAL, INC.
CUSTOMER DATA SECURITY BREACH LITIGATION

On Appeal from the United States District Court for the District of Maryland, No. 8:19-md-02879-PWG, Hon. Paul W. Grimm

---

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

Jennifer B. Dickey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

Ashley C. Parrish
Julianne L. Duran
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
aparrish@kslaw.com

Counsel for Amici Curiae

Stephanie A. Martz
NATIONAL RETAIL FEDERATION
1101 New York Avenue NW
Washington, DC 20005

Counsel for the National Retail Federation

October 3, 2022

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1744 Caption: Peter Maldini v. Accenture LLP

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chamber of Commerce of the United States of America; National Retail Federation
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

N/A

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Ashley C. Parrish Date: 10/03/2022

Counsel for: Amici Curiae

Print to PDF for Filing

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules & Regulations

Other Authorities

INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. 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 briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, the NRF represents the breadth and diversity of an industry that is the

---

[1] No counsel for a party authored this brief in whole or in part and no entity or person, other than amici, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

nation's largest sector employer with more than 52 million employees and contributes $3.9 trillion annually to GDP.

Amici's members and their subsidiaries include businesses that are often targeted as defendants in class actions. Amici are thus familiar with class action litigation, both from the perspective of individual defendants in class actions and from a more global perspective. Because of the immense pressure to settle even unmeritorious claims created by class certification, amici have a vital interest in ensuring that courts undertake the rigorous analysis that Rule 23 requires *before* they allow a case to proceed as a class action. Faithfully enforcing Rule 23 is essential not only for amici's members, but also for the customers, employees, and other businesses that depend on them.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should reverse the district court's improper class certification order. Instead of enforcing Rule 23, the court below lost sight of controlling principles and allowed this case to proceed as a sprawling class action. Data-breach cases are often resolved through a bellwether trial process, precisely because they are not well suited for class litigation. In this case, however, plaintiffs have tried to avoid individual litigation by manufacturing a class with the inventive theory that customers would have paid less for their hotel rooms had Starwood disclosed data-security issues. They then convinced the district court to certify a class, even though customers waived their rights to participate in a class action, plaintiffs' "overcharge" theory of damages is incapable of being measured on a class-wide basis, and two elements of plaintiffs' negligence claims will not be resolved in the action.

Amici submit this brief to focus on two issues that raise particular concerns for the nation's retailers and businesses: (1) the district court's failure to ensure that class members who satisfy Article III's standing requirements can be readily identified; and (2) the district court's decision to certify certain elements of plaintiffs' negligence claims for

"issues class" treatment despite finding that the claims as a whole cannot be resolved on a class-wide basis. Both errors contribute to persistent abuses of the class action procedure that harm the economy.

ARGUMENT

I. The District Court Erred in Certifying Classes Whose Members Cannot Be Readily Identified.

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 of the Constitution 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). Accordingly, when "there are multiple plaintiffs" in a lawsuit, each "must have Article III standing." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

The district court correctly recognized that plaintiffs' overpayment theory of injury raises Article III concerns because many individuals who make hotel reservations are reimbursed in full. Because those individuals are not injured and, therefore, lack standing, the district court rewrote the class definitions for plaintiffs' contract and consumer

fraud claims to include only individuals "who bore the economic burden" of their hotel stay. App. 11.[2] But the district court's attempt to solve the Article III problem only created a new one: the classes it certified are improper because they are not readily ascertainable. *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014).

Ascertainability is a threshold requirement and "an 'essential' element of class certification" that is "encompassed" by Rule 23. 1 Newberg & Rubenstein on Class Actions § 3:2 (6th ed.); *see also EQT Prod. Co.*, 764 F.3d at 358. Unless absent class members are identifiable, a court cannot perform the "rigorous analysis" that Rule 23 mandates. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)); *see also Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972) (class members must be "readily identifiable"). Without a ready means of ascertaining who belongs in the proposed class, the named plaintiffs cannot show that common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Nor can they show that a

[2] "App." citations refer to the Appendix of Marriott International Inc.'s Petition, No. 22-184.

class action is "superior to other available methods for fairly and efficiently adjudicating the controversy," taking into account "the likely difficulties in managing a class action." *Id.*

Under this Court's precedent, the ascertainability analysis requires reference to "objective criteria." *EQT Prod. Co.*, 764 F.3d at 358; *see also* 1 McLaughlin on Class Actions § 4:2 (18th ed.) ("a Rule 23(b)(3) class must be presently ascertainable based on objective criteria that do not require the court to delve into the merits of the claims"). The plaintiffs must also carry their burden to identify an "administratively feasible" way for the court to determine whether a particular individual is a class member. *EQT Prod. Co.*, 764 F.3d at 358 (quoting 7A Wright & Miller, Federal Practice & Procedure § 1760 (4th ed.)). "[C]lass litigation should not move forward when a court cannot identify class members without 'extensive and individualized fact-finding or mini-trials.'" *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 658 (4th Cir. 2019) (citing *EQT Prod. Co.* 764 F.3d at 358).

The classes as certified by the district court in this case do not satisfy these essential requirements. There is no objective and administratively feasible way to identify which class members "bore the

economic burden" of their hotel stay. That is because each class member would have to prove a negative — specifically, that he or she paid for the stay and was *not* reimbursed by someone else.

Taking a certify-now, worry-later approach, the district court concluded that an "individualized review" of "individual files" — which the court conceded would be "certainly required," App. 15 — did not defeat administrative feasibility because parties could self-certify that they paid for their own hotel stay, affidavits could be cross-checked against a database, and plaintiffs could rely on individual records "such as receipts and bank and credit card statements," App. 16. But that evidence is readily susceptible to dispute by defendants and is far from objective. As a result, the district court cannot resolve these individual disputes without either stripping defendants of their individual defenses or undertaking impermissible mini trials.

In rejecting defendants' argument that plaintiffs had failed to come forward with a feasible method for identifying which class members did not receive reimbursement, the district court cited to cases where the combination of self-certifying affidavits and "receipts or credit card statements documenting payment" could be used to identify class

members. App. 15–17 (quotation marks omitted). But none of the cited cases involved proof of a negative, as would be required here — which is much more complex than merely demonstrating the fact of payment for a hotel room in the first instance.

In these circumstances, relying on class member affidavits poses serious credibility issues. *See Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) ("Forcing [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."). And there is no objective evidence that could be used to avoid those issues. Neither the defendants' database nor class members' bank and credit card statements will definitively show which class members were *not* reimbursed. *Cf. id.* (holding that class could not be certified because "nothing in company databases shows or could show whether individuals should be included in the proposed class").

Significantly, plaintiffs have never identified evidence that could be used to identify class members without either eliminating defendants' individualized defenses or undertaking thousands of mini trials to determine which customers are part of the class. This case is thus

analogous to the many precedents where courts have held that a class may not be certified because ascertaining class membership would require a "complicated and individualized" review of evidentiary records. *See EQT Prod. Co.*, 764 F.3d at 359–60; *see also Martin v. Pac. Parking Sys. Inc.*, 583 F. App'x 803, 804 (9th Cir. 2014) (holding that the 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" (quoting *Rowden v. Pac. Parking Sys., Inc.*, 282 F.R.D. 581, 585 (C.D. Cal. 2012)).

In short, a class must be capable of being identified through a streamlined process relying on objective criteria *not reasonably subject to dispute*. In this case, determining whether a customer suffered an economic burden — and hence is part of the class — would require judging credibility and weighing conflicting evidence. As a result, the class definition fails.

The district court brushed aside these concerns, noting that although identifying class members would be "time consuming," the court would "carefully monitor" the case "to ensure continued administrative

feasibility." App. 17. But that is insufficient. It is the named plaintiffs' burden at the class-certification stage to "affirmatively demonstrate" that class members can be identified without individualized adjudication. *Comcast*, 569 U.S. at 33, 35 (quoting *Wal-Mart*, 564 U.S. at 350); *see also 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"). In failing to apply that burden, the district court violated Rule 23 and put the defendants in the situation of litigating against, or attempting to settle with, an unknown and indeed unknowable group of persons.

II. The District Court Further Erred in Certifying Classes as to Only Certain Elements of Plaintiffs' Claims.

This case also raises the question whether Rule 23(c)(4) empowers district courts to certify "element-only" classes when the full cause of action cannot be certified under Rule 23(b). Specifically, the district court certified classes on negligence claims to litigate the "duty and breach sub-issues," leaving the remaining elements of liability — causation and injury — to be litigated individually. *See* App. 63–64.

This Court has previously declined to resolve whether an entire cause of action must meet Rule 23(b)'s requirements for certification to

be appropriate. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 444–45 (4th Cir. 2003). The Court should take this opportunity to hold that it must. The district court's contrary approach is inconsistent with the structure of Rule 23, raises serious Article III concerns, and allows plaintiffs and courts to disassemble nearly any claim so that class certification precedent becomes meaningless.

A. The Fourth Circuit Should Adopt the Fifth Circuit's Reading of Rule 23(c)(4) as a Case-Management Tool.

In *Gunnells*, this Court held that before applying Rule 23(c)(4) to certify issues classes, a court must first determine whether Rule 23's predominance requirement is met "by examining *each cause of action* independently of one another, not the entire lawsuit." 348 F.3d at 441 (emphasis in original). Then, finding that "[p]laintiffs' cause of action *as a whole* against [defendant] satisfie[d] the predominance requirements of Rule 23[,]" the Court declined to opine on "whether predominance must be shown with respect to an entire cause of action, or merely with respect to a specific issue, in order to invoke (c)(4)." *Id.* at 444–45 (emphasis altered). The Court should now make clear that "[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance

requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

Rule 23(c)(4), which allows a class action to "be brought or maintained … with respect to particular issues," is a case-management rule, not a revolutionary device that permits element-by-element litigation. The structure of Rule 23 is informative. Rule 23(a) lists the four prerequisites of all class actions, Rule 23(b) offers three "types of class actions," and Rule 23(c) provides case-management tools and procedural requirements. A "party seeking certification must demonstrate, first, that" the class satisfies Rules 23(a) and, second, that "the proposed class" satisfies "at least one of the three requirements listed in Rule 23(b)." *Wal-Mart*, 564 U.S. at 345; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997) ("In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)."). While Rule 23(a)(b) sets forth mandatory prerequisites, Rule 23(c)(4)'s placement alongside Rule 23(c)'s other provisions proves that it is only a case-management rule — nothing more. *See Murphy v. Smith*, 138 S. Ct. 784,

789 (2018) (looking to the "surrounding statutory structure" to determine the meaning of a statutory provision).

None of Rule 23(c)'s provisions supplant Rule 23(a)'s and (b)'s substantive requirements or provide a standalone basis for class certification. Had the Rules Committee intended to permit elements-only issues classes that did not meet Rule 23(a) and (b)'s requirements, it would not have hidden such a significant expansion of the class-action device in a part of the rule dedicated to case management. More fundamentally, turning Rule 23(c)(4) into more than a mere case management tool would raise serious concerns, as it would allow plaintiffs to end run essential class action requirements. For instance, plaintiffs could avoid Rule 23(b)(3)'s predominance requirement merely by disassembling claims into their separate components. It would even circumvent the protections that apply to mass actions, including the requirement that claims may not be consolidated or coordinated solely for pretrial proceedings. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(IV).

In short, the structure and logic of Rule 23(c)(4) confirms that it is designed merely to allow a district court to limit class treatment to particular issues when "an action" — not elements of claims — satisfies

Rule 23(a) and (b). By certifying particular elements of a claim for class treatment where plaintiffs cause of action as a whole admittedly did *not* meet Rule 23(b)(3)'s predominance requirement, *see* App. 63, the district court erred.

Cases that overlook Rule 23's structure only highlight the problems of taking a permissive approach. For example, in *Martin v. Behr Dayton Thermal Products LLC*, the Sixth Circuit certified issues classes as to several different issues but did not address whether any class members actually suffered any injury. 896 F.3d 405, 416 (6th Cir. 2018). Despite the appellate court's suggestion that certifying issues classes would "materially advance the litigation[,]" the case remains pending more than four years later (14 years after it was filed). *Id.*

In any event, even under that more permissive approach, Rule 23(c)(4) issue certification would not be appropriate in this case, where individualized issues would far outweigh any common inquiries. *See, e.g., Dungan v. Acad. at Ivy Ridge*, 344 F. App'x 645, 648 (2d Cir. 2009) (applying the broad view but still determining that "the significance of individualized issues of reliance, causation, and damages in this case

meant that issue certification 'would not meaningfully reduce the range of issues in dispute and promote judicial economy'").

B. The District Court's Interpretation of Rule 23(c)(4) Raises Constitutional Concerns and Violates Supreme Court Precedent.

The district court's misguided approach also raises serious constitutional concerns and runs afoul of Supreme Court precedent requiring that class members share a concrete injury. As the Supreme Court recently affirmed, "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion*, 141 S. Ct. at 2208. Plaintiffs "must demonstrate standing for each claim that they press and for each form of relief that they seek." *Id.* "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." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

The standing requirement is incorporated in Rule 23(a). To pass the Rule 23(a) threshold analysis, plaintiffs in a class action must show that "class members have suffered the same injury." *Wal-Mart*, 564 U.S. at 348–350; *see also Ealy v. Pinkerton Gov't Servs., Inc.*, 514 F. App'x 299, 304 (4th Cir. 2013) (per curiam) (class must have "a shared injury"). The

need to enforce those essential requirements goes beyond mere prudential concerns. As the Supreme Court has held, Rule 23's requirements provide crucial safeguards, grounded in constitutional due-process principles, that must be satisfied *before* plaintiffs can benefit from the class-action device. *See Taylor v. Sturgell*, 553 U.S. 880, 901 (2008).

Here, the district court found that plaintiffs do not have a common injury that can be established with class-wide proof with respect to the negligence claim, and therefore should not have certified a class on that claim. By certifying a class as to duty and breach alone, the district court's piecemeal approach dispenses with the injury requirement in Article III.[3] By allowing litigation of individual elements of a claim — neither of which separately or together establish the core standing requirements — the district court's approach opens the door to

[3] The district court's approach also raises substantial Seventh Amendment concerns, as any facts found by a jury deciding the certified common issues of duty and breach may be reexamined by later juries that must decide the individualized questions of causation and injury that overlap with those common issues. *See* John H. Beisner et al., U.S. Chamber of Commerce Inst. for Legal Reform, Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform 44 (2022) ("2022 Chamber Report").

class members who may have suffered no injury at all, and certainly no injury that is traceable to the defendants' conduct. And by permitting litigation that ultimately must end for those class members before a liability determination, the district court's approach invites advisory opinions. *See TransUnion*, 141 S. Ct. at 2203.

The decision below also enables plaintiffs to carve up claims, allowing cases to proceed as class actions, even in scenarios the Supreme Court has rejected. In *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), for example, the district court certified a class of antitrust plaintiffs on "the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders," and under the belief that "damages resulting from overbuilder-deterrence impact could be calculated on a classwide basis." *Id.* at 31 (quotation marks omitted). The Supreme Court rejected the proposed class because plaintiffs failed to "establish[] that damages are capable of measurement on a classwide basis." *Id.* at 34. But an "element-only" approach to Rule 23(c)(4) would have allowed plaintiffs to proceed on the question whether Comcast engaged in "anticompetitive clustering conduct" that "deter[red] entry of

overbuilders," *id.* at 31 (quotation marks omitted), leaving the questions of causation and damages for individual determination.

Rule 23(c)(4) should not be interpreted to allow guiding precedent to be so easily dodged. Instead, this Court should reverse the district court's holding that Rule 23(c)(4) permits the certification of classes as to only some elements of a cause of action.

III. The District Court's Impermissibly Broad Approach to Class Certification Threatens to Severely Burden Businesses and the Economy.

Rigorous enforcement of Rule 23's requirements is essential to protecting defendants' due process rights to "present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). As courts have recognized, class certification is not merely "a game-changer," but "often the whole ballgame." *Marcus*, 687 F.3d at 591 n.2. The district court's vastly overbroad approach to class certification will lead to immense pressure on businesses to settle even frivolous claims, leaving them with no choice but to pass their litigation and settlement costs onto consumers, resulting in harm to the economy as a whole.

Class certification often creates 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 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) (class certification "places pressure on the defendant to settle even unmeritorious claims"); *see also* Fed. R. Civ. P. 23(f) Advisory Comm. Notes (1998) ("An order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."). 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); *see also* 2022 Chamber Report at 25–26, 38 ("Faced with mounting discovery obligations, which typically equal a substantial percentage of all litigation costs, many class

action defendants simply choose to settle rather than continue the litigation, regardless of the frivolity of the claim."). In particular, "defendants are increasingly facing settlement pressures from class actions defined in a wildly overbroad manner in which only a fraction of class members are even conceivably affected by the alleged misconduct giving rise to the litigation." 2022 Chamber Report at 38.

The problems are well documented: 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 (2010). Indeed, in 2021, companies reported settling 73.1% of class actions. *See* Carlton Fields, *The 2022 Carlton Fields Class Action Survey: Best Practice in Reducing Cost and Managing Risk in Class Action Litigation* 26 (2022), https://bit.ly/2WDSTEP. Corporate defense costs for class actions in the United States crossed the $3 billion threshold for the first time in 2021, continuing a rising trend that started in 2015. *Id.* at 7. The cost to defend a single class action can run into nine figures. *See* Adeola Adele, *Dukes v. Wal-Mart:* Implications for Employment Practices Liability Insurance 1 (2011). And class actions can drag on for years. *See* U.S.

Chamber Inst. for Legal Reform, Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions 1 (2013), http://bit.ly/3rrHd29 ("Approximately 14 percent of all class action cases remained pending four years after they were filed."). Moreover, even after substantial money and time are poured into litigating class actions, any benefits from the actions rarely reach class members. *See* 2022 Chamber Report at 12–21, 26 ("to the extent there are any winners in class actions, they are not consumers").

Insurmountable pressure to settle even unmeritorious claims harms the economy as a whole, because the costs of defending and settling abusive class actions are ultimately absorbed by consumers and employees through higher prices or lower wages. *Id.* at 12, 26. "[T]he diversion of hundreds of millions of dollars away from productive purposes, as well as the time and attention of entrepreneurs, means prices are higher, new products are not brought to market, and new jobs are not created." H.R. Rep. No. 115-25, at 4 (2017); *see also* Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004). "Businesses spend millions of dollars each year to defend against the

filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices." Lisa Litwiller, 7 Chap. L. Rev. at 202 (quotation marks omitted).

These concerns apply with particular force here. The benefits of class actions can be achieved only if class members can be ascertained and allowed to receive their share. Certifying classes that cannot be ascertained only disincentivizes efficient settlements and incentives coercive ones. Similarly, elements-only class actions are highly inefficient for class members, contrary to the district court's unsupported suggestion that "efficiency gains" from duty and breach issue-classes would outweigh the fact that "important issues related to causation, affirmative defenses, and damages … will not be resolved during issue-class adjudication." App. 66. Even if plaintiffs succeed in establishing duty and breach, they will have no prospect of obtaining any damages. Instead, there would need to be hundreds of thousands of individual suits to determine the issues of causation, injury, and damages — the cost of

which might well exceed the costs of individual litigation. *See* 2022 Chamber Report at 43–44.

CONCLUSION

The Court should reverse the district court.

Respectfully submitted,

/s/ Ashley C. Parrish

Ashley C. Parrish
Julianne L. Duran
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
aparrish@kslaw.com

Counsel for Amici Curiae

Jennifer B. Dickey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

Stephanie A. Martz
NATIONAL RETAIL FEDERATION
1101 New York Avenue NW
Washington, DC 20005

Counsel for the National Retail Federation

October 3, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a), I certify that this brief complies with the length limitations set forth in Fed. R. App. P. 32(a)(7) because it contains 4,354 words, as counted by Microsoft Word 365 ProPlus, excluding the items that may be excluded under Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook Font.

Dated: October 3, 2022

/s/ Ashley C. Parrish
Ashley C. Parrish

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 22-1744(L) as

☑ Retained ☐ Court-appointed(CJA) ☐ CJA associate ☐ Court-assigned(non-CJA) ☐ Federal Defender

☐ Pro Bono ☐ Government

COUNSEL FOR: Chamber of Commerce of the United States of America;

National Retail Federation as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

/s/ Ashley C. Parrish
(signature)

Please compare your information below with your information on PACER. Any updates or changes must be made through PACER's Manage My Account.

Ashley C. Parrish
Name (printed or typed)

(202) 737-0500
Voice Phone

King & Spalding LLP
Firm Name (if applicable)

(202) 626-3737
Fax Number

1700 Pennsylvania Avenue NW

Washington, DC 20006
Address

aparrish@kslaw.com
E-mail address (print or type)

CERTIFICATE OF SERVICE *(required for parties served outside CM/ECF)*: I certify that this document was served on _____ by ☐ personal delivery; ☐ mail; ☐ third-party commercial carrier; or ☐ email (with written consent) on the following persons at the addresses or email addresses shown:

_____ _____
Signature Date

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1744 Caption: Peter Maldini v. Accenture LLP

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chamber of Commerce of the United States of America; National Retail Federation
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

N/A

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Ashley C. Parrish Date: 10/03/2022

Counsel for: Amici Curiae

Print to PDF for Filing