No. 21-2895

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: NIASPAN ANTITRUST LITIGATION

A.G.C. BUILDING TRADES WELFARE PLAN; CITY OF PROVIDENCE, RHODE ISLAND; ELECTRICAL WORKERS 242 AND 294 HEALTH & WELFARE FUND; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 49 HEALTH & WELFARE FUND; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 HEALTH & WELFARE FUND; NEW ENGLAND ELECTRICAL WORKERS BENEFITS FUND; PAINTERS DISTRICT COUNCIL NO. 30 HEALTH & WELFARE FUND; UNITED FOOD & COMMERCIAL WORKERS LOCAL 1776 & PARTICIPATING EMPLOYERS HEALTH AND WELFARE FUND; MILES WALLIS; CAROL PRASSE,

Appellants.

On Rule 23(f) Appeal from the United States District Court
for the Eastern District of Pennsylvania, No. 13-md-2460

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

Cory L. Andrews
John M. Masslon II
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org
Counsel for Amicus Curiae

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IDENTITY & INTEREST OF *AMICUS CURIAE*[*]

Founded in 1977, Washington Legal Foundation is a public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF often appears as an *amicus* to oppose the certification of unwieldy and improper class actions under Rule 23. *See, e.g.*, *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

WLF's Legal Studies division, the publishing arm of WLF, regularly produces articles by outside experts on class certification. *See, e.g.*, Frank Cruz-Alvarez & Britta Stamps, *Individualized Assessments of Employees Stopped a Class Action in Its Tracks*, WLF Legal Opinion Letter (June 4, 2020) <https://bit.ly/3sOZ3PH>; Lindsay Breedlove, *Meticulous Predominance Assessment Sinks Pharma-Marketing RICO Class Action*, WLF Legal Backgrounder (Aug. 12, 2016) <https://bit.ly/3pNlTW8>.

[*] All parties have consented to the filing of this brief. No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation or its counsel, helped pay for this brief's preparation or submission.

WLF has long opposed efforts to transform the class action from a procedural device aimed at avoiding the inefficiencies of deciding the same claims repeatedly into a tool for altering the parties' substantive rights. This Court's ascertainability rule—faithfully applied here by the District Court—ensures that courts honor the constitutional limits on class actions by requiring plaintiffs to show actual, not presumed, compliance with Rule 23 before any class is certified. *See, e.g.*, *Carrera v. Bayer* Corp., 727 F.3d 300 (3d Cir. 2013); *Hayes v. Wal-Mart Stores*, 725 F.3d 349 (3d Cir. 2013). WLF fears that Plaintiffs' attempt to dilute that venerable rule, if successful, would have disastrous consequences for litigants and the courts.

INTRODUCTION & SUMMARY OF ARGUMENT

To represent a class, a named plaintiff must offer a "reliable and administratively feasible mechanism for determining which putative class members fall within the class definition." *City Select Auto Sales, Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 439 (3d Cir. 2017). Plaintiffs offered the District Court no workable way of identifying members of the class of end-payors they seek to represent from more than 20 million transactions. That is the end of this case.

Although waived below, Plaintiffs urge this Court to accept an unexplained, individualized affidavit process to excuse their burden of identifying class members. Yet the very need for so many individualized inquiries to know who is in the class necessarily defeats ascertainability as well as typicality under Rule 23. Although they invite this Court to retreat from its longstanding ascertainability precedents, Plaintiffs offer no cogent reason for doing so. The Court should refuse Plaintiffs' invitation and reaffirm its well-established ascertainability standard.

Plaintiffs and their *amici* contend that the proposed class is ascertainable, but those arguments ignore important elements of the requirement. While Plaintiffs propose objective criteria on which class membership *might* be based, ascertainability also requires an administratively feasible means to analyze those supposedly-objective criteria—without "extensive and individualized fact-finding." *City Select*, 867 F.3d at 440. The lack of any administratively feasible means here is just one reason the District Court properly denied certification.

This Court's robust ascertainability standard tracks the text, structure, and purpose of Rule 23. Under Rule 23, class members must be feasibly ascertainable at the class-certification stage. Without some

reliable way of establishing class membership, district courts would lack any meaningful way to assess typicality under the Rule. Thus, Rule 23 intuitively requires trial courts to ascertain class membership *before* turning to the specific requirements of Rule 23(a).

Ascertainability also advances vital policy goals, rooted in due process, for both class-action defendants and absent class members. The Due Process Clause entitles *all* parties to an ascertainable class. Absent class members are entitled to meaningful notice so that they may opt out or exercise their rights as part of the class. And defendants have a right to know that class adjudication provides finality and that any judgment is not subject to collateral attack. This Court's ascertainability rule furthers both goals by identifying absent class members and deciding the best way to notify them of both the suit and their opt out rights.

Finally, Plaintiffs suggest that this Court's ascertainability caselaw "effectively bars large class actions" in "data-rich industries" like pharmaceuticals. But Plaintiffs' own district-court authorities from this circuit—certifying large pharmaceutical class actions—betray that claim. Contrary to Plaintiffs' doomsaying, a robust ascertainability

requirement does not sound a death knell for such claims. Rather, it merely ensures that class actions are properly reserved for cases that may use that procedural device without compromising Rule 23 and the parties' due-process rights. This Court should affirm the District Court's well-reasoned decision.

ARGUMENT

I. THIS COURT'S ROBUST ASCERTAINABILITY STANDARD FURTHERS SEVERAL VITAL INTERESTS.

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (cleaned up). A Rule 23(b)(3) damages class is the "most adventuresome" departure from this usual rule. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Unlike classes certified under Rules 23(b)(1) and 23(b)(2), a Rule 23(b)(3) class binds absent members to the litigation largely for "convenien[ce]" rather than necessity. *Amchem*, 521 U.S. at 615.

This Court's ascertainability rule advances at least three vital goals: (1) eliminating heavy administrative burdens that undermine the efficiencies Rule 23 demands; (2) protecting absent class members' due-process rights to notice and to opt out; and (3) safeguarding defendants'

due-process interests in the finality of judgments. *See Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012); *see also* Daniel Luks, *Note: Ascertainability in the Third Circuit: Name That Class Member*, 82 Fordham L. Rev. 2359, 2370-71 (2014) (collecting cases).

But Plaintiffs and their attorneys dislike this Court's ascertainability rule. Having failed to meet their burden in the District Court to establish a workable way of identifying class members from more than 20 million transactions, Plaintiffs now invite the Court to make an exception in this case or, barring that, to roll back the ascertainability standard in every case. The Court should decline that self-serving invitation, reinforce its prior ascertainability holdings, and affirm.

A. Rule 23 requires an ascertainable class.

This Court's ascertainability requirement flows from the text, structure, and purpose of Rule 23. Class certification is proper only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites" of Rule 23 are met. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). "Courts generally treat the [ascertainability] requirement as a precursor to Rule 23 and therefore examine the

implicit requirements before proceeding to the Rule's explicit requirements." William B. Rubenstein, et al., *Newberg on Class Actions* § 3:2, at 156 (5th ed. 2011). Without a workable way to establish class membership, a district court cannot "rigorously" examine, "at the outset," Rule 23's prerequisites for class certification. *Carrera*, 727 F.3d at 307.

Start with typicality. If class members cannot be known, then a district court lacks any way to assess whether "the claims and defenses of the representative parties are typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3). A court cannot decide which representative claims and defenses are typical unless it first determines who is (and is not) part of the class.

Above all, a plaintiff seeking class certification in federal court also must show that a class action will benefit the class. *See, e.g.*, *Amchem*, 521 U.S. at 625-26; Fed. R. Civ. P. 23(a)(4) (every class representative must "fairly and adequately protect the interests of the class"); Fed. R. Civ. P. 23(h) (advisory committee's notes to 2003 amendment) ("One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are

sought on the basis of a benefit achieved for class members."). A representative plaintiff cannot bestow a benefit on, or protect the interests of, a class whose members she cannot find.

While Plaintiffs and their *amici* suggest that a putative class is ascertainable so long as the class invokes some objective criteria for class membership, courts must also ask "whether an analysis of [these] criteria is administratively feasible." *Newberg on Class Actions* § 3:3, at 164. Administrative feasibility means that "identifying class members is a manageable process that does not require much, if any, individual factual inquiry." *Id.*

That is why Rule 23(b)(3)(D) instructs district courts, in deciding whether "a class action [would be] superior to other available methods for fairly and efficiently adjudicating the controversy," to consider "the likely difficulties in managing a class." Fed R. Civ. P. 23(b)(3)(D). Simply put, an unascertainable class is an unmanageable class. Ascertainability thus "overlaps with" this inquiry because "[i]t must be administratively feasible for the court to determine whether a given person fits within the class definition without effectively conducting a mini-trial." 1 McLaughlin on Class Actions § 4:2 (15th ed. 2018).

Plaintiffs here bore the burden to prove that it was administratively feasible for the court to identify all class members. But it is *never* feasible if tens of thousands of end-payors, spanning 20 million transactions, must submit individualized affidavits attesting to their class status. *See, e.g.*, *In re Asocal Antitrust Litig.*, 907 F.3d 42, 51 (1st Cir. 2018) ("Inefficiency can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues.").

In short, Plaintiffs' anemic view of ascertainability advances none of the interests of Rule 23.

B. Ascertainability safeguards the due-process rights of absent class members.

Apart from undermining Rule 23, diluting the ascertainability requirement as Plaintiffs urge would also dilute the due-process rights of absent class members. Every absent class member is entitled, under the Due Process Clause, not only to know of the putative class but also whether she falls in or out of it. These protections include the right to notice, an opportunity to be heard, and the right to opt out. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985). Notice, if "reasonably calculated," ensures that each class member thus "retain[s] the right to

opt out of the class and [any] settlement, preserving the right to pursue their own litigation." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 792 (3d Cir. 1985).

Absent class members cannot enjoy these rights, however, if a district court has no meaningful and administratively feasible way to know who they are and how best to notify them of the suit. An ascertainable class is thus crucial to identifying those entitled to notice, those entitled to relief, and those bound by the judgment. When, as here, there is no workable means of ascertaining the identity of those absent class members, no class may be certified.

One of Plaintiffs' *amici* dismisses these concerns as "largely hypothetical or exaggerated." Br. for The Comm. to Support the Antitrust Laws at 24. As they see it, class membership need not be known with "perfect accuracy," *id.* at 30, because "publication of notice in print and online media, rather than individual notice," will suffice, *id.* at 25. But notice-by-publication is at the far pole from "perfect." A study by an experienced claims-administration consultancy concludes that the median claim rate in notice-by-publication cases is 0.023%—one in 4,350. *See, e.g.*, Alison Frankel, *A Smoking Gun in Debate over*

Consumer Class Actions?, Reuters, May 9, 2014 <https://perma.cc/PS2N-UC73>; Daniel Fisher, *Odds of a Payoff in Consumer Class Action? Less than a Straight Flush*, Forbes, May 8, 2014 <https://perma.cc/6MAK-ZSPC>. Using Plaintiffs' own estimate (at 52) of class size, a one-in-4,350 response rate here equals about five claims paid to some 24,000 end-payors. That is no benefit to the parties or to the Court.

To be sure, notice-by-publication has a role to play in class actions, but as a supplement to direct notification or when most absent class members are already known. But when, as here, membership turns on who is absorbing the costs across 20 million transactions with six specific exclusions, the likelihood is vanishingly small that publication would notify members of the class.

At any rate, Plaintiffs and their *amici* ignore the fact that a class action is no more than a procedural vehicle—a way to streamline litigation to benefit the litigants and the court. A class whose members cannot be found serves no legitimate purpose. So not only could no policy ground justify casting aside absent class members' due-process rights, but Plaintiffs invoke no valid policy ground to begin with.

C. Ascertainability protects the due-process rights of defendants.

Certification of an unidentifiable class places the defendant in an untenable bind. If the defendant loses, all class members will likely treat the judgment as preclusive. But if the defendant wins, class members will claim that the judgment violates due process and binds only those few class members who received actual notice. In reality, the defendant defeats only a handful of plaintiffs and has failed to buy its peace from the rest.

Diluting the ascertainability requirement as Plaintiffs urge would thus erode a class defendant's right to know whom the litigation binds. When a judgment issues, the class defendant wants "the entire plaintiff class bound by res judicata"—just as the defendant is bound. *Shutts*, 472 U.S. at 805. One corollary of *Shutts* is that a class-action defendant has a right to know *before trial* who is in the class and that the judgment will bind every one of them. The parties should bear equally the benefits and burdens of any judgment. Yet without a reliable and efficient way to notify all class members of the class, a defendant cannot know who will be bound by any judgment or settlement.

Plaintiffs' view would revive the same win-against one, lose-against-all unfairness that was once a hallmark of one-way intervention. But Rule 23 was amended "specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *In re Citizens Bank, N.A.*, 15 F.4th 607, 617 (3d Cir. 2021) (quoting *Am. Pipe & Constr. Co. v. Utah.*, 414 U.S. 538, 547 (1974)). Ascertainability is integral to this solution because it "protects defendants by clearly identifying the individuals to be bound by the final judgment." *Hayes*, 725 F.3d at 355. It lets defendants know that litigation settled, resolved through dispositive briefing, or tried to verdict will fully end the controversy.

If this were a single-plaintiff case, the plaintiff would have to prove at trial (or earlier) that it really is an end-payor who has a right to recover. Due process would require that the defendant, in turn, be given an opportunity to challenge the plaintiff's evidentiary showing. That opportunity would include the right to cross-examine the plaintiff and to have a court or jury resolve any factual dispute. The class-action device cannot erase the defendant's due-process rights.

Plaintiffs' view of ascertainability thus ignores the "critical need" to "determine how the case will be tried." Fed. R. Civ. P. 23(c)(1) (advisory committee's notes to 2003 amendment). Diluting or eliminating the ascertainability requirement would thwart that "critical need" by effectively eliminating a defendant's ability to know who the class members are *and* how to test the adequacy of their claims. If district courts no longer may ensure an administratively feasible means of identifying the class, then a defendant can know only that some absent class members *may* submit affidavits at some undefined point in the future. As here, that information is useless.

Forcing defendants to guess how they must present defenses and evaluate who is, or is not, in the class cannot be squared with due process or the purpose of Rule 23. Above all, class treatment cannot force a defendant to forfeit its right to litigate substantive defenses to the claims. *Dukes*, 564 U.S. at 367 ("[A] class cannot be certified on the premise that [a defendant] will not be entitled to litigate its . . . defenses to individual claims."). Class certification "should not proceed if the court is unable to formulate an adjudication plan that assures due

process for a defendant in these regards." American Law Institute, *Principles of Law: Aggregate Litigation* § 2.07 cmt. j (2009).

Here, class membership simply cannot be established through a streamlined, objective mechanism. And Plaintiffs' vague promise of future affidavits from potential class members is not enough. This Court has roundly rejected "[f]orcing [a defendant] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability." *Marcus*, 687 F.3d at 594. The District Court was therefore right to refuse Plaintiffs' proposed method of establishing class membership based on no more than "potential class members' say so." *Id.* Fundamental issues of due process cannot be sloughed off to back-end proceedings.

II. PLAINTIFFS' LAX APPROACH TO ASCERTAINABILITY WOULD DRASTICALLY LOWER THE BAR FOR CLASS CERTIFICATION.

Adopting Plaintiffs' lax approach to ascertainability would dramatically lower the threshold for class certification. If a district court may certify a class on the say-so of a plaintiffs' expert without resolving the need for repeated individualized inquiries, it places a heavy thumb on the scale in favor of class certification. Such deference would be "a delegation of judicial power to the plaintiffs, who can obtain

class certification just by hiring a competent expert." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

This case proves the point. Plaintiffs' expert proposed establishing class membership by using retail-transaction data from pharmacy-benefit managers. But merely identifying a pharmacy-benefit manager's clients (i.e., pharmacies) is not enough; retail data simply cannot distinguish reimbursed intermediaries from end-payors. No surprise, then, that when Plaintiffs' expert purported to identify four class members using her flawed methodology, she misidentified two of the four as end-payors; they weren't. Yet under Plaintiffs' preferred rule, any plaintiff who can find an expert with a "solution" in hand, no matter how unreliable and ultimately unworkable, can secure class certification. That can't be right.

Class certification is the most important decision a district court makes in any class action. It's "the whole shooting match." David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Prod. Liab. L. & Strategy 10 (Feb. 2009). "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of

the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). Only about two percent of certified class actions ever go to trial. *See 2019 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 34 (2019) <https://classactionsurvey.com>.

This hydraulic pressure to settle holds true even if the plaintiffs' claims lack merit. "[F]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (emphasizing the "risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims.").

Deferring questions of ascertainability beyond the certification stage may be convenient for class-action plaintiffs' attorneys, but it leaves defendants in a perilous bind. Once a class is certified, few companies are prepared to roll the dice on incurring a massive

judgment. In the end, a class action in which the plaintiffs can obtain certification based on the vague promise of future affidavits from potential class members is a powerful cudgel for securing lucrative settlements.

What's more, runaway litigation costs do not simply fall on individual defendants; they impose a drag on the entire U.S. economy. Plaintiffs' flawed approach to ascertainability, if adopted, would raise the cost of doing business in a wide swath of industries that find themselves perennial targets of the plaintiffs' bar. The costs of abusive class actions are "payable in the last analysis by innocent investors for the benefit of speculators and their lawyers." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J. concurring)). And the ultimate price for those added costs is often passed along to consumers and workers, in the form or higher prices and lower wages.

III. THIS COURT'S ASCERTAINABILITY RULE DOES NOT EFFECTIVELY PRECLUDE PHARMACEUTICAL CLASS ACTIONS.

"If this class is not ascertainable," Plaintiffs contend (at 51), "then Circuit law effectively bars large class actions" in "data-rich industries"

like pharmaceuticals. According to Plaintiffs (at 54), this Court's robust ascertainability doctrine "has effectively abrogated Rule 23." These arguments are baseless, both as to pharmaceutical class actions specifically and large class actions generally.

As to pharmaceutical class actions, district courts in this circuit have routinely fashioned ascertainability standards, applied those standards, and—yes—certified large classes. Indeed, another section of Plaintiffs' brief (at 44) touts the "routine certification of end-payor pharmaceutical antitrust classes." Plaintiffs' own authority, *In re: Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig.*, 421 F. Supp. 3d 12 (E.D. Pa. 2019), proves the point. What's more, this Court ultimately affirmed that certification order. *See In re: Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig.*, 967 F.3d 264 (3d Cir. 2020).

In that case, the district judge applied this Court's ascertainability standard and concluded that the plaintiffs' proposed class of end-payors satisfied it. *In re Suboxone*, 421 F. Supp. 3d at 71-74. Of course, that certified class did not involve a complex class definition with six specific exclusions as found here. Nor did the plaintiffs in *In re Suboxone*

advance an expert who tried—but failed—to identify end-payors based solely on retail data from pharmacy-benefit managers. So the fact of certification there cannot show why a class should have been certified here.

If anything, Plaintiffs' authority confirms that ascertainability has not proven to be the death knell of pharmaceutical class actions in this circuit; just the opposite is true. Indeed, Plaintiffs admit (at 36) that they cannot find *any* case, "inside or outside the Third Circuit," that has "declined to certify a similar class." That strongly suggests that district judges in this circuit continue to certify classes bringing such claims when they conclude that ascertainability has been satisfied.

Nor will antitrust laws go unenforced due to the District Court's ascertainability holding, as Plaintiffs' *amici* suggest. *See* Br. for the Am. Antitrust Inst. at 24-26. On the contrary, the District Court has already certified a class of direct purchasers. *See In re: Niaspan Antitrust Litig.*, 397 F. Supp. 3d 668, 691 (E.D. Pa. 2019) (explaining that the ascertainability requirement for the class of direct purchasers "is easily satisfied"). That the proposed class of end-payors lacks standing to

enforce federal antitrust laws betrays any suggestion that class certification is needed here to avoid watering down antitrust law.

Of course, any ascertainability decision "must be tailored to the facts of the particular case." *Carrera*, 727 F.3d at 442. That's what happened here. The District Court did not announce a categorical rule that individualized inquiries are *never* permitted. Rather, it considered the extent of individualized inquiries needed to determine class membership across 20 million transactions with six specific exclusions and found that task administratively infeasible. That was not an abuse of discretion.

It is unhinged hyperbole for Plaintiffs to insist that applying this Court's ascertainability rule, or one different from what Plaintiffs would prefer, effectively precludes all class actions. At bottom, Plaintiffs' argument conflates preventing *improper* class actions with preventing *all* class actions. Yet the burden of a class action always outweighs its benefits when, as here, the members of the class cannot feasibly be ascertained. A class action minus a class burdens the absent class members, who are deprived of notice. It burdens the defendant, who is deprived of finality. And it burdens the courts, which are saddled with

follow-on litigation. It benefits only the named plaintiffs and their counsel.

CONCLUSION

The Court should affirm the District Court's order denying class certification.

Respectfully submitted,

/s/ Cory L. Andrews
Cory L. Andrews
John M. Masslon II
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that

1. Both attorneys whose names appear on this brief are members of the bar of this Court.

2. This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 4,049 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

3. 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 uses 14-point font Century Schoolbook font.

4. The electronic and paper versions of this brief are identical.

5. A virus-detection program (Webroot Antivirus Software 2021) scanned this document and detected no virus.

Dated: March 18, 2022

/s/ Cory L. Andrews
CORY L. ANDREWS

CERTIFICATE OF SERVICE

I certify that on March 18, 2022, I filed the foregoing with the Clerk of the United States Court of Appeals for the Third Circuit using the CM/ECF system, which will serve all counsel of record.

/s/ Cory L. Andrews
CORY L. ANDREWS