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 CO., ET AL.,

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court for the District of New Mexico
Case No. 1:16-md-2695 (District Judge James O. Browning)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING APPELLEES/CROSS-APPELLANTS AND AFFIRMANCE IN PART AND REVERSAL IN PART

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GLOSSARY

LJN – Law Journal Newsletters

NAS – Natural American Spirit

WLF – Washington Legal Foundation

INTEREST OF AMICUS CURIAE*

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 LLC v. Ramirez*, 594 U.S. 413 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

WLF's Legal Studies division, its publishing arm, 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); Lindsay Breedlove, *Meticulous Predominance Assessment Sinks Pharma-Marketing RICO Class Action*, WLF Legal Backgrounder (Aug. 12, 2016).

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* No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

INTRODUCTION

The courts of appeals are divided on how to apply Rule 23's ascertainability requirement. Some courts hold that whether an administratively feasible way exists to identify class members "alone will rarely, if ever, be dispositive." *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1305 (11th Cir. 2021) (citation omitted). Other courts have held that "[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012); *see* Charles A. Wright et al., 7A *Federal Practice & Procedure* § 1760 (4th ed. July 2023 supp.) ("the requirement that there be a class will not be deemed satisfied unless the class description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member"). So on the one side of the split courts have essentially said that one of Rule 23's requirements does not apply at the class-certification stage while courts on the other side of the split rigorously apply that requirement.

It surprises no one that district courts certify more classes in circuits that apply a relaxed ascertainability standard. Increased class

certifications is important because class certification is often "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); *see Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). "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). As the Supreme Court has recognized, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975)).

Given the importance of class certification, plaintiffs' attorneys sue in circuits where obtaining class certification is easier. Courts that certify a class despite ascertainability defects invite *in terrorem* settlements. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). This case thus has far-reaching implications beyond this dispute. This Court

should join its sister circuits that require an administratively feasible way to identify class members before a district court may certify a class. Applying such a rule here means affirming the denial of some classes and reversing the certification of the six statewide classes.

STATEMENT

Santa Fe Natural Tobacco Co. sells Natural American Spirit cigarettes. Some NAS cigarettes have a menthol flavor and others have a tobacco flavor. NAS's packaging said that they were "natural," "organic," and "additive-free" or "100% additive-free." The packaging also correctly stated that "[n]o additives in our tobacco does NOT mean a safer cigarette." Advertisements used the same disputed terms and included the same disclaimer.

Plaintiffs sued in 2015, arguing that Santa Fe's describing its cigarettes as natural, organic, and additive-free violated consumer protection laws. They argued that the labels and advertisements deceived consumers in two ways. First, they argued that using the terms natural and additive-free made purchasers believe that NAS cigarettes were safer than other cigarettes. Second, Plaintiffs argued that the

menthol could enter the cigarettes' tobacco, making the additive-free tobacco claim false.

To pressure Defendants into settling their meritless claims, Plaintiffs moved to certify twelve state-specific classes of all NAS cigarette purchasers for common-law unjust-enrichment claims and statutory consumer-protection claims. They also sought to certify a nationwide class (or, alternatively, state-specific classes) of consumers who bought NAS's menthol cigarettes for breach of express warranty.

Plaintiffs' class-certification motion relied heavily on two experts' opinions. Dr. Jennifer Pearson said that consumers thought it might be safer to use cigarettes labeled as "natural" or "additive-free." But she did not say whether consumers' purchasing decisions were affected by these thoughts. Dr. Michael Cummings said that consumers chose NAS cigarettes for many reasons. For example, they preferred the taste. Defendants' expert, Dr. Kent Van Liere, testified that over 90% of consumers chose NAS cigarettes for a reason other than perceived health benefits and only a sliver of those who thought NAS cigarettes were safer were willing to pay more because of that difference.

The District Court largely denied Plaintiffs' class-certification motion. But it did certify six statewide classes for the alleged breach of express warranty based on menthol infiltrating the tobacco. Both parties cross-petitioned this Court for leave to appeal the class-certification/denial order, and this Court granted both petitions. Thus, this Court agreed to review the entire class-certification order.

SUMMARY OF ARGUMENT

A. This Court has recognized that Rule 23 includes an implicit ascertainability requirement. But unlike most of its sister circuits, this Court has yet to explain the test that district courts must use at the class-certification stage to decide whether a proposed class is ascertainable. The Court should join those circuits that require an administratively feasible way to identify who is a class member for a proposed class to be ascertainable.

The Supreme Court has held that courts must rigorously apply Rule 23's requirements at the class-certification stage. In other words, it is inappropriate to wait until after a merits trial to apply Rule 23's requirements. The only way to follow this command is to determine whether a class is ascertainable at the class-certification stage.

Recognizing the inherent strength of this argument, Plaintiffs' opening brief does not use the words ascertainability or ascertainable a single time; the District Court used those terms over 100 times in its class-certification opinion. The lack of ascertainable classes here explains Plaintiffs' avoiding the key issue.

B. The Due Process Clause protects all litigants, including absent class members. The absent class members' due-process rights include the right to opt out of a class action and to pursue their individual claims separately from the class. But these due-process rights disappear if courts apply a lax ascertainability standard. Absent class members may not receive notice of a class action and therefore may be unable to opt out of the class if they are not easily identifiable. A robust ascertainability standard, on the other hand, protects absent class members' due-process rights.

C. Defendants also have due-process rights. This is why the Federal Rules of Civil Procedure were amended to eliminate one-way intervention. But a lax ascertainability standard essentially returns to the days of one-way intervention. If defendants lose at trial, all class members will treat the liability finding as preclusive. If, however, the

defendants win then the absent class members will argue that the judgment does not bind them because they were never notified that they were members of the class and could opt out of the class. In other words, defendants cannot be assured that a merits victory will preclude future claims by absent class members.

ARGUMENT

A ROBUST ASCERTAINABILITY STANDARD FURTHERS THE PURPOSE OF FEDERAL RULE OF CIVIL PROCEDURE 23.

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. *Id.* at 615.

A robust ascertainability rule advances at least three vital goals. *See Marcus*, 687 F.3d at 593; *see also* Daniel Luks, Note, *Ascertainability in the Third Circuit: Name That Class Member*, 82 Fordham L. Rev. 2359, 2370-71 (2014) (collecting cases). First, it eliminates heavy

administrative burdens that undermine the efficiencies Rule 23 demands. Second, it protects absent class members' due-process rights to notice and to opt out. Third, it safeguards defendants' due-process interests in the finality of judgments.

But Plaintiffs and their lawyers detest a robust ascertainability rule. Unable to advance an administratively feasible way to determine class membership, Plaintiffs ask this Court to adopt a lax ascertainability standard that would allow them to extort an *in terrorem* settlement from Defendants. The Court should decline that self-serving invitation, adopt the robust ascertainability standard used by three of its sister courts of appeals, and affirm in part and reverse in part the class-certification order.

A. Rule 23 Requires That Classes Be Ascertainable.

Plaintiffs must prove an ascertainable class at the class-certification stage. *See Evans v. Brigham Young Univ.*, 2023 WL 3262012, *6 (10th Cir. May 5, 2023). This 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). This Court has held that the ascertainability standard is a "sub-requirement of numerosity." *Evans*, 2023 WL 3262012 at *5 (citing *Rex v. Owens ex rel. Oklahoma*, 585 F.2d 432, 436 (10th Cir. 1978)); *see also* 1 *Newberg and Rubenstein on Class Actions* § 3:2 (6th ed. Nov. 2023 supp.) (Some courts hold that ascertainability "is an 'essential' element of class certification, that it is implied in Rule 23(a), [and] that it is encompassed in Rule 23(c)(1)(B).").

Without a workable way to establish class membership, a district court cannot "rigorous[ly]" examine, "at the outset," Rule 23's prerequisites for class certification. *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). First, this Court has noted that it is impossible to know whether the numerosity requirement is satisfied without proof of the "ascertainable numbers constituting the class." *Rex*, 585 F.2d at 436.

Second, if absent class members cannot be easily identified then district courts cannot assess whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class" and whether "questions of law or fact common to class members predominate over any questions affecting only individual members."

Fed. R. Civ. P. 23(a)(3), (b)(3). In other words, a court cannot decide which representative claims and defenses are typical—and whether they predominate—unless it first finds an administratively feasible way to determine class membership.

Third, plaintiffs seeking class certification 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) note ("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 class representative cannot obtain a benefit for, or protect the interests of, absent class members she cannot find.

That is why district courts, in deciding whether "a class action [would be] superior to other available methods for fairly and efficiently adjudicating the controversy," must 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 the 'manageability' inquiry of Rule 23(b)(3)(D), in which

a court assesses whether a class action is superior to other available methods of fairly and efficiently adjudicating the controversy." 1 *McLaughlin on Class Actions* § 4:2 (20th ed. Oct. 2023 supp.) (citation omitted). In other words, "it must be administratively feasible for the court to determine whether a given person fits within the class definition without effectively conducting a mini-trial." *Id.*

In an act of cleverness, Plaintiffs do not use the word "ascertainability" or "ascertainable" once in their opening brief, despite the District Court's using the words over 100 times in its opinion. This failure to address one of the key legal questions before this Court is reason enough to affirm those parts of the District Court's order denying class certification.

But if this Court is generous and reads into Plaintiffs' brief arguments about ascertainability and why the District Court's analysis on that issue is wrong, the Court should reject those arguments. Plaintiffs argue that ascertainability is not a question for class-certification. Rather, they argue, that these concerns are a "post-trial" issue. Plaintiffs' Br. 4, 49. This turns the Supreme Court's jurisprudence on its head.

The Supreme Court has emphasized that each of Rule 23's requirements must be proven *before* a class is certified. *See Wal-Mart*, 564 U.S. at 351. This includes whether the class's members are readily ascertainable. Assume for example, that whether each class member has standing will raise individualized questions. Under this Court's precedent, a district court cannot proceed beyond the summary-judgment stage unless each individual plaintiff proves she has standing. *Glover River Org. v. U.S. Dep't of Interior*, 675 F.2d 251, 254 n.3 (10th Cir. 1982) (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979); *Citizens Concerned for Separation of Church & State v. City & Cnty. of Denver*, 628 F.2d 1289, 1294-95, 1298 (10th Cir. 1980)).

It makes no sense to say that deciding whether injured class members—the only ones who may be members of a damages class, *TransUnion*, 594 U.S. at 442—can be ascertained may wait until after trial is complete. The trial cannot happen until plaintiffs prove that absent class members suffered Article III injuries. Here, Plaintiffs implicitly concede that whether putative class members suffered an Article III injury will be unknown until after trial. But again, a trial

cannot happen until the District Court can ascertain which putative class members have standing to pursue their claims.

This is why the First Circuit requires an administratively feasible way to ascertain class membership. As it explained, district "court[s] may proceed with certification" only if there is an "administratively feasible" way to "distinguishing the injured from the uninjured class members." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015) (cleaned up).

In short, Rule 23 requires that plaintiffs prove an administratively feasible way to identify class members at the class-certification stage. *See Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 658 (4th Cir. 2019) (citing *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014)). Plaintiffs failed to satisfy their burden here. So this Court should affirm in part and reverse in part the District Court's order while joining the First, Third, and Fourth Circuits, which have announced robust ascertainability standards consistent with Rule 23's text, history, and structure.

B. A Robust Ascertainability Standard Protects The Due-Process Rights Of Absent Class Members.

Apart from undermining Rule 23, diluting the ascertainability requirement also dilutes absent class members' due-process rights. Every absent class member is entitled to know of the putative class and whether she is a member. 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). "[N]otice is essential in order to ensure that class members who desire to pursue their own claims individually have the opportunity to exercise their right to opt out of the class." *Gottlieb v. Wiles*, 11 F.3d 1004, 1012 (10th Cir. 1993), *abrogated on other grounds*, *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Absent class members are deprived of these rights if a district court lacks an administratively feasible way to identify class members and 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, class certification is inappropriate.

It is no answer to these due-process concerns to say that notice by publication suffices. A study found that the median claim rate in notice-by-publication cases is 0.023%—one in 4,350. *See* 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. Thus, the only way to preserve absent class members' due-process rights is to adopt a robust ascertainability standard.

C. A Robust Ascertainability Standard Protects Defendants' Due-Process Rights.

Certification of unidentifiable classes places defendants in a double bind. If the defendants lose, all class members will likely treat the judgment as preclusive. But if the defendants win, class members will claim that the judgment violates due process and binds only those class members who received actual notice. In other words, the defendants have rid themselves of only a sliver of claims rather than all class members' claims.

A lax ascertainability requirement thus erodes class defendants' right to know who the litigation binds. When a judgment issues,

defendants want "the entire plaintiff class bound by res judicata"—just as defendants are 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 all of them. The parties should bear equally the benefits and burdens of any judgment. Yet without an administratively feasible way to identify all class members, defendants cannot know who will be bound by any judgment or settlement.

Adopting a lax ascertainability requirement, as Plaintiffs implicitly urge, 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." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974). Ascertainability is key to this solution because it "protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable." *Abraham v. WPX Prod. Prods., LLC*, 317 F.R.D. 169, 254 (D.N.M. 2016); *see Hayes v. Wal-Mart Stores,*

Inc., 725 F.3d 349, 355 (3d Cir. 2013). It reassures defendants that any resolution of the dispute will fully end the controversy.

If only one plaintiff sued here, he would have to prove at or before trial that the advertisements touting NAS cigarettes as additive-free caused him to buy the cigarettes because he thought that there was no menthol in the tobacco. Due process would also require that Defendants have the chance to challenge the plaintiff's evidentiary showing. That opportunity would include the right to cross-examine the plaintiff and have the fact-finder resolve any factual dispute. The class-action device cannot erase Defendants' due-process rights by eliminating that opportunity.

A lax ascertainability requirement thwarts the "critical need" to "determine how the case will be tried" by effectively eliminating defendants' ability to know who the class members are and how to test the adequacy of their claims. *See* Fed. R. Civ. P. 23(c)(1) note. If district courts cannot ensure an administratively feasible means of identifying the class, then defendants can know only that some absent class members may submit evidence—even after trial has finished. That

information does not help ensure the defendants know who will be bound by a judgment before trial.

Forcing defendants to guess who is a class member cannot be squared with due process or Rule 23's purpose. Class treatment cannot force defendants to forfeit their right to litigate substantive defenses to the claims. *Wal-Mart*, 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."). Yet that is what a lax ascertainability standard requires. Thus, the only way to protect defendants' due-process rights is to adopt a robust ascertainability standard.

CONCLUSION

This Court should affirm in part and reverse in part while adopting a robust ascertainability standard for this circuit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,488 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and 10th Cir. R. 32(B).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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