No. 23-2165

In the

United States Court of Appeals

For the Fourth Circuit

MR. DEE'S INC., on behalf of themselves and all others similarly situated; RETAIL MARKETING SERVICES, INC., on behalf of themselves and all others similarly situated; CONNECTICUT FOOD ASSOCIATION, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

INMAR, INC.; CAROLINA MANUFACTURER'S SERVICES, INC.; CAROLINA SERVICES; CAROLINA COUPON CLEARING, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina, No. 1:19-cv-00141-WO-LPA
Hon. William L. Osteen, Jr.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES

Jennifer B. Dickey
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062

Brian D. Schmalzbach
MCGUIREWOODS LLP
800 East Canal Street
Richmond, Va. 23219
Telephone: (804) 775-4746
bschmalzbach@mcguirewoods.com

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

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.)
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- 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.)
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No. 23-2165 Caption: Mr. Dee's Inc., et al. v. Inmar, Inc., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chamber of Commerce of the United States of America
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
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If yes, identify all parent corporations, including all generations of parent corporations:

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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:

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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/ Brian D. Schmalzbach Date: February 2, 2024

Counsel for: Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents around 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 Chamber's members and their subsidiaries are often targeted as defendants in class actions. The Chamber thus is familiar with class-action litigation, both from the perspective of individual defendants in class actions and from a more global perspective. The Chamber has a significant interest in this case because the proper application of Article III and Rule 23 raise

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

issues of immense significance not only for the Chamber's members, but also for the customers, employees, and other businesses that depend on them.

INTRODUCTION

This case provides a stouthearted example of the "rigorous analysis" that Rule 23 demands. In response to putative class counsel's shifting array of proposed manufacturer class definitions, the district court insisted on evenhanded application of the rules that prevent inflated, inefficient, and improper classes.

First, the district court stood firm in defense of bedrock Article III limitations on federal jurisdiction in the class-action context. "In an era of frequent litigation"—and especially "class actions"—"courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). Those formal rules of standing are squarely implicated here, where Plaintiffs' own class-wide theory of damages revealed that nearly *one-third* of the putative class of manufacturers that paid shipping fees had no observable overpayment from the alleged antitrust conspiracy.

A class with such a glut of uninjured manufacturers would violate Article III. The act of certification makes absent class members parties

subject to the same standing requirements as named plaintiffs. So those uninjured class members cannot ride the coattails of any class members with standing. This Court should take the opportunity to clarify what is implicit in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021): no damages class can be certified without evidence that each class member has Article III standing. And in any event, the need to winnow out all those uninjured class members would make it impossible for Plaintiffs to prove that any common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The district court correctly held that common issues would not predominate when so many class members would lack common proof of injury.

Second, Plaintiffs' attempt to cure that Article III problem by defining uninjured members out of the class only makes matters worse. Limiting the class to those injured by paying "observably higher" fees creates a classic fail-safe class. This Court should confirm what is implicit in its own precedent and explicit in the overwhelming majority of circuits: fail-safe classes cannot be certified. That rule is compelled by the text of Rule 23 and by concerns of fundamental fairness: a defendant who prevails against a fail-safe class member is rewarded with an unenforceable judgment against

someone who has thus been defined out of the class. Neither the letter nor the spirit of Rule 23 allows such "heads I win, tails you lose" classes.

Third, Plaintiffs' attempt to carve out an arbitrary rump class fares no better. The district court aptly recognized that limiting the class through capricious date and volume cutoffs left thousands of similarly situated manufacturers free to bring their own lawsuits. And it was no abuse of discretion to conclude that such a class does not promote the efficiency required for certification under Rule 23, especially since class-action litigation is meant to be "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). For these reasons and those in Defendants' response brief, this Court should affirm.

ARGUMENT

I. The District Court properly refused to certify the substantially uninjured All Payer class.

Plaintiffs proposed an "All Payer" class containing around 7,800 manufacturers, over 2,500 of which had no observable overpayment injury according to Plaintiffs' expert. The district court was right to turn aside that class bloated by the uninjured. As a straightforward Article III matter, that

class could not be certified because it would contain uninjured class members. And in any event, the need to prove separate injuries for 32% of that class would destroy the predominance of any common issues.

A. This Court should confirm that Rule 23(b)(3) classes must exclude the uninjured.

In this Circuit, a fundamental class-certification question has escaped resolution: Can a damages class be certified without evidence that each class member has Article III standing? *See Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 659 (4th Cir. 2019) (leaving "[t]he question of how best to handle uninjured class members . . . for another day"). This Court should resolve this issue and clarify that every member of a class certified under Rule 23(b)(3) must have standing.

1. *TransUnion* held that "[e]very class member must have Article III standing in order to recover individual damages." 141 S. Ct. at 2208. But that decision addressed a final judgment awarding damages to absent class members—not the class-certification order itself. So the Supreme Court did not explicitly resolve "the distinct question whether every class member must demonstrate standing *before* a court certifies a class." *Id.* at 2208 n.4.

This Court likewise refrained from explicitly answering that question in *Krakauer*. The plaintiffs in that Telephone Consumer Protection Act case contended that every member of the certified class was injured by receiving telemarketing calls violating that act. This Court agreed, holding that "the statute itself recognizes a cognizable constitutional injury." 925 F.3d at 652. So that case did not address a putative class stuffed with significant numbers of uninjured individuals, and the Court thus had no need to "expound on what it would mean if there were." *Id.*; *see also In re Marriott Int'l, Inc.*, 78 F.4th 677, 689 n.7 (4th Cir. 2023) (not addressing the need for "assurance at the certification stage that all class members have suffered the necessary injury in fact at the hands of the defendant").[2]

2. Ordinary principles of Article III standing nevertheless confirm why each putative class member must show standing before certification. First, "'[e]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the

[2] The Court did recognize, however, that "to the extent Article III imposes distinct constraints on the composition of the class, that issue ought to be taken up separately." *Krakauer*, 925 F.3d at 652.

litigation.'" *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)); *see also TransUnion*, 141 S. Ct. at 2208 (plaintiffs must maintain standing "at all stages" of a case). At class certification, the necessary manner and degree of evidence is, at a minimum, proof by a preponderance of the evidence. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 & n.6 (9th Cir. 2022) ("We therefore join our sister circuits in concluding that plaintiffs must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence." (citing cases)); *see also* 1 McLaughlin on Class Actions § 3:12 (20th ed.) ("[T]here is broad agreement in the circuit courts to apply a preponderance of the evidence standard to the class certification determination."). So before certifying a class, and thus exercising jurisdiction over the merits of the claims of absent class members, the district court must find by a preponderance of admissible evidence that it may do so. *See Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (unnamed class members are not "part[ies] to the class-action litigation *before the class is certified*").

Second, in the analogous context of intervention by right, each plaintiff must show Article III standing to seek money damages. *See Town of Chester*

v. Laroe Ests., Inc., 581 U.S. 433, 439 (2017). Class actions and mandatory intervention are both procedures that "enabl[e] a federal court to adjudicate claims of multiple parties at once, instead of in separate suits . . . , leav[ing] the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.). In each case, additional plaintiffs are in some sense joined. These plaintiffs would need independent Article III standing in an unjoined damages lawsuit. Nothing about the procedural mechanisms for considering their claims can relax that irreducible constitutional requirement. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act."); *see also* Fed. R. Civ. P. 82 (instructing that the "rules do not extend . . . the [subject-matter] jurisdiction of the [United States] district courts").

This Court thus should join the other appellate courts refusing to certify damages classes containing uninjured members. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to

be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision."); 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1785.1 (3d ed.) ("[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention.").

B. Even if the uninjured could be damages class members, the absence of classwide proof of injury defeats predominance.

In any event, the district court correctly refused to certify the All Payer class because the many uninjured class members destroy predominance under Rule 23(b)(3). JA2111. Before certifying a damages class, a court must engage in "rigorous analysis"—based on evidentiary proof—to determine that common issues will predominate over individualized questions. *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004); *see also Comcast*, 569 U.S. at 34 (quoting *Amchem*, 521 U.S. at 615) (noting "the court's duty to take a 'close look' at whether common questions predominate over individual ones"). The district court's rigorous analysis was not remotely an abuse of discretion.

The key fact that the district court properly relied on was that Plaintiffs' own expert report showed no injury for a whopping 32% of the All Payer class. JA2089-2090, JA2094. Thus, there was no "common evidence that *all* members of [that] class were injured." JA2098 (emphasis added). And indeed, there was no common evidence that the nearly one-third of class members who were uninjured according to Plaintiffs' expert had any other cognizable injury. Nor did Plaintiffs identify any viable "winnowing mechanism" to separate any injured from the many uninjured. JA2094-2095. So proving any injuries among that 32% (if it could be done at all) would require individual inquiries unfit for a Rule 23(b)(3) class.

Nor does the Ninth Circuit's holding in *Olean* show any abuse of discretion by the district court here. *See* Opening Brief 58-59, 62-63. *Olean* recognized that "[w]hen individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions." 31 F.4th at 668. "Because the Supreme Court has clarified that '[e]very class member must have Article III standing in order to recover individual damages,' Rule 23 also requires a district court to

determine whether individualized inquiries into this standing issue would predominate over common questions." *Id.* at 668 n.12.

In *Olean* (unlike here), the plaintiffs' evidence purported to resolve the question of *each* class member's standing simultaneously. If that jury "found that [the plaintiffs' expert's] model was reliable, then the [plaintiffs] would have succeeded in showing antitrust impact on a class-wide basis." *Id.* at 681. And vice versa. *Id.* So "[i]n neither case would the litigation raise individualized questions regarding which members of the [class] had suffered an injury." *Id.* The plaintiffs' theory in that particular case thus addressed each class member's standing at once. But that is precisely what the district court concluded these Plaintiffs failed to accomplish—leaving the court with inescapable predominance-destroying individual inquiries.

II. The district court properly refused to certify the fail-safe Fixed List classes.

Plaintiffs also sought certification of so-called Fixed List classes limited to those "manufacturers that directly paid observably higher" shipping fees. JA1446. That tactic sought to avoid the fatal problem of uninjured manufacturers by defining them out of the classes. But Plaintiffs created an equally fatal problem: those definitions would make fail-safe classes defined

in terms of their success on the merits. *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 n.9 (4th Cir. 2014) (fail-safe classes are "defined so that whether a person qualifies as a member depends on whether the person has a valid claim").

1. As Defendants explained, most circuits hold that fail-safe classes are categorically impermissible. Response Brief 36-37. And this Circuit has already instructed its district courts to consider the fail-safe problem "as part of [their] class-definition analysis." *EQT Prod.*, 764 F.3d at 360 n.9. The view by the overwhelming majority of circuits is correct. And this Court should expressly confirm that fail-safe classes are impermissible in the Fourth Circuit too, for at least four reasons.

First, fail-safe classes turn Rule 23(c)(3) on its head. That provision requires that "[w]hether or not favorable to the class, the judgment in a class action must . . . include and describe those whom the court finds to be class members." That requirement was added to prevent "one-way intervention" by opportunistic plaintiffs who sought the benefit of a judgment against a defendant without the risk of being subject to an adverse judgment. Fed. R. Civ. P. 23(c)(3) adv. comm. note to 1966 amendment (noting that some courts had allowed individuals to join a class action "after a decision on the merits

favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision"). A fail-safe class allows that same "heads I win, tails you lose" gambit that Rule 23(c)(3) was meant to prevent. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (fail-safe classes are improper "because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment"); *see also* Erin L. Geller, Note, *The Fail-Safe Class As an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769, 2803–04 (2013) ("Much like the spurious class action in which class members could intervene to receive the benefit of a favorable judgment but were not bound by an adverse judgment, fail-safe class members are only bound by a favorable judgment.").

Second, fail-safe classes destroy the efficiency that the class-action device is meant to foster**.** Merits rulings against fail-safe classes do not resolve claims, period. In that case, there would be no class members, no one would be bound by the adverse judgment, and all would be free from the finality that res judicata is meant to preserve in class litigation. That scenario would waste judicial resources and be "palpably unfair" to

defendants. *Kamar v. Radio Shack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010); *see also* Geller, 81 Fordham L. Rev. at 2802 ("Fail-safe classes thus violate res judicata by allowing class members to relitigate a claim that has been fully adjudicated against the defendant, such that a final judgment on the merits in favor of the defendant does not prevent the defendant from liability against future claimants.").

Third, Rule 23(c)(1) requires courts "[a]t an early practicable time" to determine "whether to certify the action as a class action" and, if so, to "define the class." But fail-safe classes cannot be defined until a final determination on the merits; only then can the composition of the class be determined. *See Bolden v. Walsh Const. Co.*, 688 F.3d 893, 895 (7th Cir. 2012) ("Using a future decision on the merits to specify the scope of the class makes it impossible to determine who is in the class until the case ends."); *accord* JA1447. A class whose membership cannot be ascertained until that point is not "sufficiently definite" to satisfy Rule 23(c)(1)(A), *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012), and is certainly not sufficiently definite at the requisite "early practicable time."

Fourth, fail-safe classes likewise violate Rule 23(c)(2)'s requirement to provide notice to damages class members, enabling them to object or opt out.

Because class membership cannot be determined until after a final merits resolution, "the court cannot know to whom notice should be sent." *Orduno v. Pietrzak*, 932 F.3d 710, 717 (8th Cir. 2019). The letter and spirit of Rule 23 thus forbid fail-safe classes.

2. The Fixed List classes here are classic fail-safes: "manufacturers . . . can only be in the proposed classes if they paid observably higher shipping fees." JA1447. Thus, "if Plaintiffs fail to prove a member paid observably higher fees to Defendants, that member can no longer be a class member." JA1447-1448. Plaintiffs' window-dressing approach of citing a list of expected class members does not change the fact that under their proposed class definition, "class membership is conditioned on having suffered antitrust injury or impact in the form of increased shipping fees." JA1446-1447; *see also* Response Brief 41-43.

Plaintiffs' attempt to strip that condition out of the class definition in favor of a naked list of putative class members fares no better. *See* Opening Brief 21-25. That gambit does not change the substance of the class, which is based on the identical fail-safe infrastructure. *See* Response Brief 41-51. And in any event, a list of purported class members stripped of its defining characteristics does not satisfy the requirement that "[a]n order that certifies

a class action must define the class." Fed. R. Civ. P. 23(c)(1)(B); *see also* 1 McLaughlin on Class Actions § 4:2 ("[I]t is insufficient merely to provide a list, however lengthy, of persons said to be in the class and leave it to the court to devise a class definition."). So the district court was right to deny certification of the Fixed List classes.

III. The district court properly refused to certify a Limited Payer class that would not meaningfully resolve this dispute.

Last, the district court soundly exercised its discretion in denying certification of the Limited Payer class of manufacturers. As the court noted, limiting that class to manufacturers who paid shipping fees "during more than 8 different calendar months" and/or "for at least 2.2 million coupons" was "arbitrary." JA2069. And it left those arbitrarily excluded manufacturers "free to pursue litigation outside of the class," which "frustrates one of the main purposes of class actions—avoiding multiple lawsuits." JA2074-2075.

Those well-grounded conclusions amply establish that the Limited Payer class would not be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *see also*

JA2069.[3] Resolving the claims of some allegedly affected plaintiffs only to leave practically indistinguishable plaintiffs to file independent lawsuits would turn Rule 23 on its head. *See* Fed. R. Civ. P. 23(b)(3) adv. comm. note to 1966 amendment (Rule 23(b)(3) is designed to promote "uniformity of decision as to persons similarly situated"). And the district court is well situated to identify the risk of fragmented litigation from this gerrymandered class. So this Court should remain "'cognizant of both the considerable advantages that our district court colleagues possess in managing complex litigation and the need to afford them some latitude in bringing that expertise to bear.'" *In re Marriott Int'l*, 78 F.4th at 685 (quoting *Krakauer*, 925 F.3d at 654). Those advantages in managing complex litigation warrant affirming the class-certification orders here.

IV. Circumventing Article III and Rule 23 restrictions on class actions harms American businesses and the economy as a whole.

The district court's rigorous analysis for each proposed class was a step in the right direction toward combatting the ills that burdensome class-action litigation imposes on the business community and the public. Class-

[3] As the district court noted, the same analysis supports its holding that the Limited Payer class is not ascertainable by reference to objective criteria. *See* JA2069-2075; *see also* Response Brief 46-54.

action litigation costs in the United States are enormous and growing. In 2022, those costs surged to $3.5 billion, continuing a long-running trend of rising costs. *See* 2023 Carlton Fields Class Action Survey, at 4–6 (2023), available at https://ClassActionSurvey.com. Defending *even one* class action can cost a business over $100 million. *See, e.g.*, Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011). And those class actions can persist for years, accruing legal fees, with no resolution of class certification—let alone the dispute as a whole. *See* U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, at 1, 5 (Dec. 2013), available at http://bit.ly/3rrHd29 ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis.").

The extraordinary exposure opened up by a court's certification of a class also creates immense pressure on defendants to settle even cases that ought to be resolved in their favor on the merits. Judge Friendly aptly termed these "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). As the Supreme Court explained, "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); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"). Over the last five years, well over half of class actions have resulted in settlements—including over 73% of class actions in 2021. *See* 2023 Carlton Fields Class Action Survey 22.

Judicial recommitment to rigorous enforcement of both Article III and Rule 23 at the class-certification stage would be a step in the right direction. "Enforcing Article III's requirements at the class certification stage ensures that parties and courts do not needlessly expend time and money—and defendants are not faced with unjustified settlement pressure—litigating a certified class action through trial only for a court to conclude at final judgment that significant portions of the certified class lack standing." U.S. Chamber Institute for Legal Reform, TransUnion *and Concrete Harm: One Year Later*, at 51 (June 2022), available at https://instituteforlegalreform.com/wp-content/uploads/2022/06/ILR-Research-Paper-Spokeo-Transunion-v9-FINAL.pdf. Enforcing the bar on fail-safe classes would likewise prevent

blackmail settlements based on eye-popping putative class sizes that would be decimated after final judgment. Absent rigorous analysis of the sort the district court employed here, the already immense pressure on businesses to settle improperly brought class actions will continue to balloon without regard to whether plaintiffs have suffered any actual harm. That coercion hurts the entire economy, because the attorney's fees and costs accrued in defending and settling overbroad class actions are ultimately absorbed by consumers and employees through higher prices and lower wages. *See* U.S. Chamber Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform*, at 40 (Aug. 2022), available at https://instituteforlegalreform.com/wp-content/uploads/2022/08/ILR-Class-Action-Flaws-FINAL.pdf (explaining why "overbroad class actions are nothing more than a mechanism for expanding the size of a given class to justify a windfall for attorneys who claim to represent the interests of uninjured class members").

CONCLUSION

For these reasons, this Court should affirm the District Court's judgment.

Dated: February 2, 2024

Respectfully submitted,

/s/ Brian D. Schmalzbach

Brian D. Schmalzbach
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
(804) 775-4746
bschmalzbach@mcguirewoods.com

Jennifer B. Dickey
Jonathan D. Urick
U.S. Chamber Litigation Center
1615 H Street NW
Washington, D.C. 20062

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

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/s/ Brian D. Schmalzbach
Brian D. Schmalzbach

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I hereby certify that on February 2, 2024, the foregoing was filed with the Clerk of the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system, which will also serve counsel of record.

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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McGuireWoods LLP Firm Name (if applicable)	(804) 698-2304 Fax Number
Gateway Plaza, 800 East Canal Street Richmond, VA 23219 Address	bschmalzbach@mcguirewoods.com E-mail address (print or type)

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