No. 19-2809

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAM HARGROVE, et al.,
Plaintiffs-Appellants,
v.
SLEEPY'S, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Jersey, Case No. 3:10-cv-1138-PGS-LHG

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NEW JERSEY CIVIL JUSTICE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

Steven P. Lehotsky
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062

Alida Kass
New Jersey Civil Justice Institute
112 West State St.
Trenton, NJ 08608

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

CORPORATE DISCLOSURE STATEMENT

Amici curiae certify that they have no outstanding shares or debt securities in the hands of the public, and they do not have a parent company. No publicly held corporation has a 10% or greater ownership in *amici curiae*.

/s/ Adam G. Unikowsky

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

All parties consent to the filing of this amicus brief.[1]

STATEMENT OF INTEREST

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. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community. The Chamber frequently files amicus briefs in class-action cases, including in this Court. *See, e.g.*, *Ferreras v. American Airlines, Inc.*, No. 18-3143; *Mielo v. Steak 'N Shake Operations, Inc.*, No. 17-2678.

The New Jersey Civil Justice Institute ("NJCJI") is a bipartisan, statewide group comprised of small businesses, individuals, not-for-profit groups, and many of the State's largest business associations and professional organizations. NJCJI and its members believe that a fair civil justice system resolves disputes

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

expeditiously, without bias, and based solely upon application of the law to the facts of each case. A fair civil justice system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured individuals are compensated fairly for their losses.

Businesses, including *amici*'s members, are almost always the defendants in class action litigation. Businesses—and indirectly the customers, employees, and communities that depend on them—have a strong interest in the proper application of the rules governing class certification. Among those rules are the requirement that a class be ascertainable—that is, that it be "defined with reference to objective criteria," and that there be a "reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (quotation marks omitted). The Court should reiterate that the ascertainability requirement is well-grounded in the text and policy of Rule 23, and that the District Court correctly applied that requirement to the facts of this case.

SUMMARY OF ARGUMENT

This Court's precedents correctly hold that a class cannot be certified under Federal Rule of Civil Procedure 23(b)(3) unless it is ascertainable. Under Rule

23(b)(3), a class cannot be certified unless class litigation is superior to individualized litigation, and common issues predominate over individualized issues. These requirements will necessarily not be met if it is impossible to ascertain reliably who is in a class.

To show ascertainability, a plaintiff must demonstrate that either *all*, or *almost all* class members can be ascertained from objective records, such as documents from a company's database. The mere prospect of proffering self-serving affidavits from putative class members is not sufficient to show ascertainability. To be sure, a defendant cannot defeat class certification merely by showing the theoretical possibility that objective records do not establish a class's composition with absolute precision. In some cases, objective records may be slightly over-inclusive, and the additional work necessary to ascertain the class with precision may not be enough to defeat class certification. But where objective records are insufficient to determine class membership of *any* class member, the class is not ascertainable.

Here, the District Court correctly ruled that the class was not ascertainable. Plaintiffs' evidence—consisting largely of Driver Rosters and Gate Logs—does not allow the court to determine whether any driver worked full-time for Sleepy's, as required to establish class membership under Plaintiffs' class definition.

Plaintiffs do not suggest that the class membership can be reliably inferred from the Driver Rosters and Gate Logs. Instead, plaintiffs suggest that an adverse

inference can be drawn from Sleepy's alleged failure to keep records on its employees' hours. That argument lacks merit because it wrongly presumes the conclusion that the drivers are, in fact, Sleepy's employees. Further, Plaintiffs' argument misinterprets *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), would violate the Rules Enabling Act, and would create grave separation-of-powers concerns.

ARGUMENT

I. RULE 23(B)(3) REQUIRES A CLASS THAT IS ASCERTAINABLE BY REFERENCE TO OBJECTIVE CRITERIA.

As this Court has repeatedly recognized, a class cannot be certified unless it is ascertainable. To meet the ascertainability requirement, a plaintiff must prove that "(1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (internal quotation marks omitted).

Because Rule 23 does not explicitly utter the word "ascertainable," some members of this Court have authored separate opinions urging the Court to jettison the ascertainability requirement. *See Byrd*, 784 F.3d at 172 (Rendell, J., concurring); *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 443-44 (3d Cir. 2017) (Fuentes, J., concurring). Of course, the Court is bound by its precedents holding that a class cannot be certified unless it is ascertainable. But with respect to

those separate views, this Court's precedents are correct. Ascertainability is not an atextual *addition to* the express requirements of Rule 23(b)(3); it is a textually-grounded *application of* those express requirements. Specifically, it is an inherent prerequisite for Rule 23(b)(3)'s superiority and predominance requirements to be satisfied.

Rule 23(b)(3) states that a damages class cannot be certified unless the putative class representative proves, among other requirements, superiority and predominance. In order to prove superiority, the plaintiff must establish "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"—even after taking account of "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). And in order to prove predominance, the plaintiff must establish "that the questions of law or fact common to class members predominate over any questions affecting only individual members." *Id.*

Ascertainability is a corollary of those two requirements. Ascertainability is not coextensive with Rule 23(b)(3)'s requirements of predominance and superiority; a class can be ascertainable without the class meeting the predominance and superiority requirements. *Byrd*, 784 F.3d at 165, 168 (noting that ascertainability is "independent from the other requirements of Rule 23," and a court should not "inject[] the explicit requirements of Rule 23 into the ascertainability standard without actually analyzing those requirements under the correct portion of Rule 23"). But

the converse is not true: a class-action plaintiff cannot satisfy the predominance and superiority requirements *unless* the class is ascertainable.

It is easy to see why. A class action will not be manageable—and hence will not be "superior" to other methods of adjudication—if it is difficult to discern who is in the class in the first place. And likewise, it will not be possible for a plaintiff to prove that common questions "predominate over any questions affecting only individual members" if each additional class member's participation will automatically generate a non-obvious question affecting only the individual member—*i.e.*, whether that person is in the class. Only when the class representative can meet the basic requirement of explaining how the class members may be identified, can the court go on to the next step in the class-certification analysis—analyzing whether, for that readily identifiable group of class members, class litigation is superior and common questions predominate. *See id.* at 162 ("Ascertainability functions as a necessary prerequisite (or implicit requirement) because it allows a trial court effectively to evaluate the explicit requirements of Rule 23.").

II. ASCERTAINABILITY REQUIRES THAT ALMOST ALL CLASS MEMBERS BE IDENTIFIABLE FROM OBJECTIVE RECORDS.

Once ascertainability is properly understood as a rule about superiority and predominance, its practical contours naturally follow. As this Court has explained,

ascertainability concerns the *method* for identifying class members—and specifically, whether class members may be identified "with reference to objective criteria." *Byrd*, 784 F.3d at 163 n.1 (quotation marks omitted). Whether there are "objective criteria" for determining class membership, in turn, depends on whether membership can confidently be assessed on the basis of records not reasonably subject to dispute. That standard reflects the function of the ascertainability doctrine: The presence or absence of the requisite records determines whether the class-action mechanism is genuinely "superior" and whether common questions will in fact "predominate" over individualized inquiries into class membership. Fed. R. Civ. P. 23(b)(3).

What matters for determining the presence of "objective criteria" in this context is thus not objectivity in some abstract philosophical sense, but rather whether class membership can readily be determined from existing records. *See* 1 *McLaughlin on Class Actions* § 4:2, Westlaw (16th ed. database update Oct. 2019) ("Courts properly look below the surface of a class definition to determine whether the *actual process of ascertaining* class membership will necessitate delving into individualized or subjective determinations." (emphasis added)). This focus makes sense because it speaks to whether identifying class members will require the "extensive and individualized fact-finding or 'mini-trials'" that preclude satisfaction of Rule 23(b)(3)'s express requirements. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583,

593 (3d Cir. 2012); *see* 1 *McLaughlin on Class Actions* § 4:2 (explaining that "[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 of each person's claim," and that ascertainability thus "overlaps with" the superiority inquiry).

This Court has made clear that the objective records need not *perfectly* delineate the composition of the class. Put another way, a defendant in a class action cannot defeat class certification merely by pointing to the theoretical possibility that a list of individuals generated from objective records might exclude some class members, or may include some individuals that are not in the class. But to obtain class certification, the plaintiff has the burden to prove by satisfactory evidence that the objective records get the court *most of the way there*. That is, the plaintiff must show that the objective records produce a list that is largely coextensive with the class, and that any additional inquiries to determine the class's precise composition will be sufficiently straightforward that class litigation is still superior to individualized litigation and common questions still predominate over individual ones.

This Court's decision in *City Select* illustrates those principles. In *City Select*, the class members were auto dealerships who allegedly received junk faxes. Class counsel proposed deriving a list of class members from the defendant's business database, which included a list of customers and fax numbers. The district court

denied class certification on the ground that there was no absolute guarantee that every person in the database actually received a junk fax. 867 F.3d at 442.

This Court reversed the district court's ascertainability holding on narrow grounds. The Court held that the mere possibility that the database was overinclusive was not, in and of itself, sufficient grounds to deny class certification. *Id.* at 442 & n.4. At the same time, it did not adopt the plaintiffs' far-reaching view that they could establish ascertainability merely by offering to submit affidavits from the customers listed in the database. Instead, the Court reached a position in between. It found that if the plaintiff could show that the database was *almost* coextensive with the class, then the plaintiff could use affidavits to resolve any theoretical delta between the two without running afoul of the ascertainability requirement. The court explained: "Even if it is true that the BMW fax was not sent to every customer who had a fax number in the database during the relevant time period, the class could still be certified, so long as there is a method for determining which customers *did* receive such faxes, which could be by affidavit. *While a high degree of over-inclusiveness could prevent certification, any degree of over-inclusiveness will not do so.*" *Id.* (second emphasis added). It then observed that there was "significant circumstantial evidence that the faxes were sent to every customer in the database at that time." *Id.* at 442 n.5. Rather than resolve in the first instance whether the class was ascertainable, the court directed the District Court to "consider this evidence in

assessing whether the relevant portion of the database coupled with attestations satisfies our ascertainability standard." *Id.*

Thus, this Court's precedents hold that a class is ascertainable if the class representative can prove that objectively verifiable information either is *sufficient*, or *almost sufficient*, to ascertain the boundaries of a class—and if it is almost sufficient, that some methodology (such as affidavits) is sufficient to determine those boundaries with precision. If no objectively verifiable information exists—or if it does exist, but if the plaintiff cannot prove that the differences between that information and the class composition are sufficiently small—the class is not ascertainable, because predominance and superiority necessarily will not have been satisfied.

III. THE DISTRICT COURT CORRECTLY RULED THAT THE CLASS IS NOT ASCERTAINABLE.

Under this Court's precedents, the class in this case is not ascertainable.

A. Plaintiffs Have Not Shown How The Composition Of The Class Can Be Ascertained From Objective Records.

Plaintiffs proposed a class of "single-route" drivers—*i.e.*, drivers who delivered Sleepy's mattresses full-time. ADD24. To determine the composition of the class, they proposed using "Gate Logs" obtained from Sleepy's in discovery that identify trucks that entered Sleepy's facility, and "Driver Rosters" identifying the drivers corresponding to those trucks. ADD24-25.

As the District Court explained, however, the composition of the class cannot be reliably determined from those documents. One can assume that the documents are accurate as to the particular information that appears on them—*i.e.*, if the document states that a driver entered the gate on a particular day, then the driver did indeed enter the gate that day. But this information is not enough to establish that *any*—let alone *every*—driver is a class member. The class is defined to consist of persons who drove for Sleepy's full time, and there is no way to know from those records whether any person, in fact, drove for Sleepy's full time. The fact that a driver spent six hours delivering mattresses on a particular day says nothing about what that driver was doing the rest of that day or any other day. ADD25. Moreover, the Driver Rosters offered by the plaintiffs as proof covered only a subset of the class period—and there was no way for the court to know whether similar Driver Rosters existed for the remainder of the class period. ADD25-26. Thus, as Sleepy's explains at greater length (Sleepy's Br. 34-38), the Driver Rosters and Gate Logs do not satisfy the ascertainability requirement.

B. Sleepy's Alleged Failure To Maintain Adequate Records Is Irrelevant To The Class-Certification Analysis.

Plaintiffs' primary argument is that Plaintiffs' own failure of proof should be held against Sleepy's because of Sleepy's purported failure to maintain accurate records. Relying on *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), Plaintiffs insist that Sleepy's was legally required to maintain employee records.

Because Sleepy's allegedly failed to do so, Plaintiffs insist they are entitled to assume that the drivers listed in the Driver Rosters and Gate Logs are class members *unless* Sleepy's proves otherwise. Plaintiffs' argument misunderstands *Tyson Foods* in several respects.

First, Plaintiffs' argument incorrectly presumes the conclusion that all drivers listed in the Driver Rosters and Gate Logs are employees, thus triggering a requirement for Sleepy's to maintain records—the very issue that Plaintiffs are asking the District Court to decide in the class action. Plaintiffs rely on provisions of New Jersey law requiring employers "to keep accurate records showing the names of its employees, days and hours worked and other information." Pl. Br. 34. But these definitions apply only to *employees*—and Plaintiffs have yet to prove that the drivers listed in the Driver Rosters and Gate Logs are employees. Indeed, if a driver does *not* work full-time for Sleepy's—if he independently contracts with multiple companies to handle deliveries—then he likely is *not* an employee. The District Court cannot simply assume that a driver is an employee when the whole reason that the class is not ascertainable is that the objective records do not allow a reliable determination of whether those drivers are, in fact, employees.

Tyson Foods is different. There was no question in that case that the workers were Tyson Foods' employees, thus triggering the duty to keep records. 136 S. Ct. at 1047 (noting the undisputed "evidentiary gap created by the employer's failure to

keep adequate records"). The question at issue was whether the employees' donning-and-doffing time caused them to exceed 40 hours a week of work—not whether they were employees in the first place. As such, the plaintiffs' theory did not require them to assume the conclusion that the defendants were liable in order to obtain class certification.

Second, *Tyson Foods* does *not* hold that an employer's alleged failure to keep accurate employee records automatically permits an adverse inference as to what those records would have contained. Plaintiffs contend that if Sleepy's did not keep records for a particular driver, then the Court may automatically assume that the driver is a full-time employee of Sleepy's. But *Tyson Foods* did not endorse anything resembling that methodology. In *Tyson Foods*, the plaintiffs' expert "conducted 744 videotaped observations and analyzed how long various donning and doffing activities took." *Id.* at 1043. "He then averaged the time taken in the observations to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department." *Id.* The Court concluded that in the absence of employee-specific records, "the experiences of a subset of employees can be probative as to the experiences of all of them." *Id.* at 1048. Because "the study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action," the study could be used in a collective action. *Id.*

Thus, *Tyson Foods* holds that if several hundred employees take, on average, 18 minutes to get dressed and 21 minutes to get undressed, one might reasonably infer that other employees will take 18 minutes to get dressed and 21 minutes to get undressed. The Supreme Court did not draw an adverse inference that punished the employer for failure to keep records; rather, it simply drew an inference that was reasonable in the absence of more granular data. Here, however, the same logic does not justify assuming that a driver who entered Sleepy's gate on a particular day necessarily worked for Sleepy's full-time. Unlike workers getting dressed and undressed, different drivers may have radically different business models—some drivers might deliver mattresses for Sleepy's every day, others might deliver goods sporadically for different companies. *Tyson Foods* does not permit a court to assume that all those drivers have the same experience merely because Sleepy's does not track their activities. Moreover, the Gate Logs and Driver Rosters, standing alone, do not allow the court to infer that *any*—let alone *every*—driver identified therein worked for Sleepy's full-time. Rather, Plaintiffs ask the court to assume that fact to be true because Sleepy's did not prove otherwise. *Tyson Foods* does not permit that leap of logic.

Indeed, to adopt Plaintiffs' view would violate the Rules Enabling Act. The Rules Enabling Act bars courts from using the class-action device in a way that would "abridge … any substantive right" of any party. 28 U.S.C. § 2072(b). Thus,

if a defendant would have a defense to liability in an individual action, the Rules Enabling Act bars a court from certifying a class that would have the effect of stripping the defendant of that defense. In *Tyson Foods*, the Court held that the Rules Enabling Act *required* the court to credit the expert's study because it *would* have been admissible in individualized litigation: "In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge ... any substantive right.'" 136 S. Ct. at 1046 (quoting 28 U.S.C. § 2072(b)). But here, there is no way the Driver Rosters and Gate Logs could be used in an individual driver's case to prove that the driver worked full-time for Sleepy's. They simply recite the fact that particular drivers entered Sleepy's gate on particular days. They are not "representative evidence," in the sense of being *complete* information as to a subset of employees that could be used make inferences regarding other employees; rather, they contain incomplete information as to *all* employees. Such evidence could not establish Sleepy's liability to any particular driver, and the Rules Enabling Act therefore does not allow such evidence to establish Sleepy's liability in a class action.

In addition, Plaintiffs' argument would create serious separation-of-powers and federalism concerns. In effect, Plaintiffs ask the Court to create a judge-made

private cause of action for failure to accurately log its workers' hours. According to Plaintiffs, if a company does not log the hours of all of its drivers, those drivers should be able to sue the company; obtain the benefit of a presumption that the logs, if they existed, would have shown the drivers to be full-time employees; and obtain, as a remedy, minimum wage, time-and-a-half overtime, and all other benefits to which employees are legally entitled. But nothing in federal or New Jersey law creates a substantive requirement to log the hours of all drivers (regardless of whether they are independent contractors or employees). Nor does anything in federal or New Jersey law create Plaintiffs' proposed remedy for failure to meet that nonexistent requirement.

To the contrary, the Federal Rules of Civil Procedure provide that a court may draw an adverse inference from a company's failure to maintain adequate records only in very narrow circumstances involving bad faith, which Plaintiffs rightly do not contend are present here. Fed. R. Civ. P. 37. Although Congress is permitted to enact statutes deviating from Rule 37 (to the extent they comply with Due Process), it has not done so here. A court cannot establish a new, judge-made adverse inference rules without a basis in the Federal Rules or any statute.

C. Plaintiffs' Remaining Arguments Lack Merit.

Plaintiffs make three other arguments that reflect a misunderstanding of class action law.

First, Plaintiffs claim that the District Court's analysis "improperly focuses on the merits," because it "collapses onto the issue of whether [Sleepy's] exercised actual control over the drivers' conduct." Pl. Br. 36. But Plaintiffs overlook a core tenet of class-action practice. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). This principle applies even when there is overlap between the class-certification analysis and the merits analysis: "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.* at 351. Here, Plaintiffs chose to define the class to consist of "single-route" operators, *i.e.*, drivers who worked full-time for Sleepy's. ADD21-22. The question of whether class members can readily be identified from the class definition is a classic class-certification inquiry, even if it will be relevant to the ultimate question of liability.

Indeed, to hold otherwise would allow Plaintiffs to bypass the requirements of Rule 23 merely by manipulating the class definition. Suppose Plaintiffs were to define the class to include all drivers identified in Sleepy's Gate Logs and Driver Rosters. Such a class would unquestionably satisfy the ascertainability requirement—determining the class members would be a simple matter of mechanically

creating a list of drivers. But equally unquestionably, such a class would fail the commonality and predominance requirements because the class would be a mix of drivers who worked full-time and workers who did not work full-time, and determining who is who would require individualized inquiries. Artificially defining the class as "full-time drivers" does not solve this problem. It simply transforms the individualized inquiries from "which members get relief?" to "what drivers are in the class?" As this example shows, an impossible-to-ascertain class is just as incompatible with class litigation as an overbroad class.

Second, Plaintiffs allege that the District Court's decision is incorrect because *Sleepy*'s did not prove that the Gate Logs and Driver Rosters were incomplete. They claim that "the record is bereft of any suggestion from Sleepy's that there has ever been a period of time when drivers were not required to sign in at the gate." Pl. Br. 37. They further complain that it is not their fault that they lacked Gate Logs and Driver Rosters for most of the class period because those documents "were not produced at the class certification stage." *Id.* But it is *Plaintiffs* who bear the burden of proof. *Wal-Mart*, 564 U.S. at 351. Plaintiffs cannot obtain class certification merely by pointing to an absence of information in the record.

Third, Plaintiffs further claim that because there is a closed set of 193 potential class members, Sleepy's would have a fair opportunity to investigate the claims of each class member. Pl. Br. 38-39. But Rule 23(b)(3) is not satisfied merely because

class litigation is theoretically *feasible*. Rather, Rule 23(b)(3) is satisfied only if class litigation is the *best* way of resolving the dispute—a class action must be superior to individualized litigation. And Rule 23(b)(3) requires that classwide issues predominate—not merely that some classwide issues exist and that the court could theoretically adjudicate individualized questions after class certification. Here, because there is no way to determine Sleepy's liability to any driver without conducting an individualized analysis of whether that driver worked full-time, the Federal Rules require each driver to file their own lawsuit, rather than proceeding as a class.

CONCLUSION

This Court should affirm the denial of class certification.

Dated: February 28, 2020

Respectfully Submitted,

/s/ Adam G. Unikowsky

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Steven P. Lehotsky
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062

Alida Kass
New Jersey Civil Justice Institute
112 West State St.
Trenton, NJ 08608

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), and Local Rule 31.1(c) and 28.3(d), the undersigned counsel for *amici curiae* certifies as follows:

1. I am a member of the bar of this Court.

2. This brief complies with the type-volume limitation of Rule 29(a)(5) because the brief contains 4,411 words, excluding the parts of the brief exempted by Rule 32(f).

3. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief was prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

4. The text of the electronic brief is identical to the text in the paper copies.

5. A virus detection program, Microsoft Security Essentials, has been run on the file and no virus was detected.

I understand that a material misrepresentation may result in the Court's striking the brief and imposing sanctions. If the Court so desires, I will provide an electronic version of the brief and/or copy of the work or line print-out.

Dated: February 28, 2020

Respectfully Submitted,

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that that on February 28, 2020 I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. Ten hard copies of the foregoing brief were sent to the Clerk's Office via overnight delivery. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: February 28, 2020

/s/ Adam G. Unikowsky