No. 19-11652

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KERRY ROTH,
on behalf of herself and all others similarly situated,

Plaintiff–Appellee,

v.

GEICO GENERAL INSURANCE COMPANY,

Defendant–Appellant.

On Appeal from the U.S. District Court for the
Southern District of Florida, Case No. 0:16-cv-62942-WPD

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT APPELLANT

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July 9, 2019

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, and 11th Cir. R. 26.1, *Amicus Curiae* Chamber of Commerce of the United States of America states that, in addition to the persons listed in the Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellant Geico General Insurance Company on May 9, 2019, the following persons and entities have an interest in the outcome of this case:

1. Chamber of Commerce of the United States of America
2. King & Spalding, LLP
3. Steven P. Lehotsky
4. Marisa C. Maleck
5. Jonathan D. Urick
6. Ashley C. Parrish

Amicus Curiae Chamber of Commerce of the United States of America further states that it is a non-profit membership organization with no parent company and no publicly traded stock.

/s/ *Ashley C. Parrish*
Counsel for Amicus Curiae

Pursuant to 11th Cir. R. 29-1 and Rules 27 and 29 of the Federal Rules of Appellate Procedure, the Chamber of Commerce of the United States of America respectfully files this motion for leave to file the attached *amicus curiae* brief in support of Defendant-Appellant. Counsel for Defendant-Appellant consents to this motion. Counsel for Plaintiff-Appellee opposes this motion.

The Court should allow the Chamber the opportunity to participate as an *amicus*. Under the governing rules, motions for leave to file *amicus* briefs must state "the movant's interest"; and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3). The Court should grant this motion because the Chamber has a keen interest in participating in this case as a friend of the Court, and its proposed *amicus* brief would help the Court reach the right result.

Movant's Interest. The Chamber is the world's largest business federation. It represents 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, 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 that raise issues of vital concern to the Nation's business community, including several recent class action cases in this Circuit. *See, e.g.*, *Cordoba v. DIRECTTV, LLC*, No. 18-12077; *Brown v. Electrolux Home Products, Inc.*, No. 15-11455; *Terrill v. Electrolux Home Products, Inc.*, No. 13-90023; *Barber Auto Sales, Inc. v. United Parcel Service, Inc.*, No. 10-10821; *Cappuccitti v. DIRECTTV, Inc.*, No. 09-14107.

Almost always the defendants in class actions, businesses have a particular interest in this case because it concerns Rule 23's threshold requirement that "a plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and *clearly ascertainable*." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (emphasis added, internal quotation marks omitted). The district court did not follow this Court's mandate to ensure that there be an "administratively feasible" method for identifying class members that "does not require much, if any, individual inquiry." *Karhu v. Vital Pharms.*, 621 F. App'x 945, 946–48 (11th Cir. 2015); *Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 787 (11th Cir. 2014). In failing to enforce this requirement properly, the district court flouted its

obligation to "rigorous[ly] analy[ze]" all of Rule 23's requirements to ensure that the class action remains "an *exception* to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 351–52 (2011) (quotations omitted; emphasis added).

Why an Amicus Brief is Desirable and Relevant. "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.). "Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case." *Id.* (quotation marks and citation omitted). In this case, the Chamber's proposed *amicus* brief fulfills both functions.

First, the Chamber has "particular expertise." *Id.* In view of its broad and diverse membership, the Chamber has an unparalleled ability to assess whether a judicial decision will have a significant effect on cases not before the Court. The Chamber's experience, and the experience of its members, give it a unique insight into what legal questions are important in modern-day class action litigation and warrant clarification by this Court. In this brief, the Chamber identifies two such legal issues

that warrant treatment in a published opinion. It urges the Court to clarify the doctrinal basis of the ascertainability doctrine and to explain why the district court fundamentally misunderstood the doctrine here.

Second, the Chamber argues "points deemed too far-reaching for emphasis by a party intent on winning a particular case." *Neonatology Associates*, 293 F.3d at 132. Although the parties rightly focus on the facts of this case, the Chamber makes more general arguments about the textual basis for the ascertainability requirement. Those arguments are especially important because this Court has yet to explain the origins or scope of the ascertainability doctrine in a published decision.

All other preconditions are satisfied. Under Federal Rule of Appellate Procedure 29(a)(4)(E), the Chamber certifies that no party's counsel authored the attached brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than the Chamber, its counsel, and its members contributed money intended to fund the brief's preparation or submission. The Chamber's brief is also timely because it is filed within seven days of the July 2, 2019 filing of Defendant-Appellant's opening brief. Fed. R. App. P. 29(a)(6). Finally, the brief complies with Federal Rule of Appellate Procedure 29(a)(5), because it is

no more than half the maximum length of 13,000 words authorized for Defendant-Appellant's opening brief.

CONCLUSION

The Court should grant the motion for leave to file an *amicus* brief.

Respectfully submitted,

/s/ *Ashley C. Parrish*
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July 9, 2019

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume of Fed. R. App. P. 32(g)(1), because it contains 885 words, as determined by Microsoft Word. The motion also 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). The text appears in 14-point Century Schoolbook, a proportionally spaced serif typeface.

/s/ *Ashley C. Parrish*
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Ashley C. Parrish*
Counsel for Amicus Curiae

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26, Federal Rules of Appellate Procedure, and 11th Cir. R. 26.1, *Amicus Curiae* Chamber of Commerce of the United States of America states that, in addition to the persons listed in the Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellant Geico General Insurance Company on May 9, 2019, the following persons and entities have an interest in the outcome of this case:

1. Chamber of Commerce of the United States of America
2. King & Spalding, LLP
3. Steven P. Lehotsky
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Amicus Curiae Chamber of Commerce of the United States of America further states that it is a non-profit membership organization with no parent company and no publicly traded stock.

/s/ *Ashley C. Parrish*
Counsel for Amicus Curiae

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1 McLaughlin on Class Actions § 4:2 (15th ed.) 13

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* Authorities upon which we chiefly rely are marked with asterisks.

INTEREST OF *AMICUS* CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 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, 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* curiae briefs in cases that raise issues of concern to the nation's business community, including class actions.

Almost always the defendants in class actions, businesses have a keen interest in this case because it concerns Rule 23's threshold requirement that "a plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and *clearly ascertainable*." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (emphasis added, internal quotation marks omitted). The district court did not follow this Court's mandate to ensure that the plaintiff provides an "administratively feasible" method for identifying class members that "does not require much, if any, individual inquiry."

Karhu v. Vital Pharms., Inc., 621 F. App'x 945, 946–48 (11th Cir. 2015); *Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 787 (11th Cir. 2014). In failing to enforce this requirement, the district court failed to "rigorous[ly] analy[ze]" all of Rule 23's requirements to ensure that the class action remains "an *exception* to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 351–52 (2011) (quotations omitted; emphasis added). Policing this type of class action abuse is exceptionally important to *amicus*'s members because "[w]hen the central issue in a case is given class treatment" to be resolved "once and for all" by a single trier of fact, "trial becomes a roll of the dice" and "a single throw may determine the outcome of an immense number of separate claims," thereby exposing defendants to staggering liability. *Thorogood v. Sears Roebuck and Co.*, 624 F.3d 842, 849 (7th Cir. 2010).

STATEMENT OF COMPLIANCE WITH RULE 29(a)

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

Appellant Geico General Insurance Company has consented to the filing of this brief. Appellee Kerry Roth has not consented to the filing of this brief.

STATEMENT OF ISSUES

This case concerns whether the district court abused its discretion when it certified a class without first resolving the parties' dispute over whether there is an administratively feasible way to identify absent class members. GEICO's appellate brief addresses why the district court's certification decision does not comply with Rule 23's essential requirements. *Amicus* submits this brief to make two points: (1) the court's obligation to determine whether there is an administratively feasible method for readily identifying absent class members is grounded in and mandated by the plain text of several of Rule 23's provisions; and (2) the district court in this case short-circuited those provisions by relegating its analysis to a one-sentence footnote that did not adequately address whether plaintiff had satisfied her burden to establish that the class is clearly ascertainable. The issue presented is:

Did the district court err in certifying a class without undertaking a rigorous analysis to determine whether plaintiff could satisfy her burden to establish an administratively feasible method for identifying absent class members?

SUMMARY OF ARGUMENT

In recent decisions concerning the requirement that a class be "clearly ascertainable," this Court confirmed that a "plaintiff seeking certification bears the burden of establishing the requirements of Rule 23, including ascertainability." *Little*, 691 F.3d at 1304; *Karhu*, 621 F. App'x at 947. As the Court has recently explained (albeit in an unpublished decision), a "plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." *Karhu*, 621 F. App'x at 947–48. Despite those requirements, the district court in this case blew past its obligation to conduct a "rigorous analysis" of whether plaintiff had come forward with an administratively feasible method for identifying class members. *Dukes*, 564 U.S. at 350–51.

The district court's error in this case is unfortunately not unusual. Despite this Court's cases, the district courts in this Circuit are confused about how the ascertainability requirement should be applied. This case thus provides an ideal opportunity for the Court to issue a precedential opinion that provides meaningful guidance to the lower courts. The

Court should reaffirm that district courts should not certify a class action unless the representative plaintiff has proven that class members can be readily identified, with class membership assessed based on records not reasonably subject to dispute.

Amicus submits this brief to underscore why the ascertainability requirement recognized in this Court's decisions is firmly rooted in Rule 23's text. It also hopes to assist the Court by explaining why the district court erred when it certified a class.

1. Several of Rule 23's provisions, both on their own and when read together, require that a plaintiff seeking to certify a class must come forward with an administratively feasible method for identifying class members using objective factual records not reasonably subject to dispute. Unless the court can clearly ascertain who belongs in and out of the class, it is impossible to know whether "the class is so numerous that joinder of all members is impracticable," "there are questions of law or fact common to the class," "the claims or defenses of the representative parties are typical of the claims or defenses of the class," and "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Ascertainability is also a logical corollary of other requirements imposed by Rule 23. For instance, if there is no ready means of identifying class members, it is impossible to know whether a class action is "superior . . . for fairly and efficiently adjudicating the controversy" or whether common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Nor are courts in the position to "define the class" or to direct "appropriate notice to the class." Fed. R. Civ. P. 23(c)(1)(B), (2)(A). Moreover, in damages-seeking class actions, identifying absent class members up front is the only way to ensure that they obtain the "best notice that is practicable," providing them a meaningful opportunity to opt out of a judgment that would otherwise bind them. Fed. R. Civ. P. 23(c)(2)(B). Enforcing the ascertainability requirement is also necessary to ensuring that a judgment will be binding "whether or not favorable to the class," Fed. R. Civ. P. 23(c)(3), as doing so guards against the certification of impermissible "fail-safe" classes.

2. In this case, the district court erred when it failed to hold plaintiff to her burden of proving that GEICO's records are sufficient to identify absent class members without resort to individualized inquiries. Although the parties disputed whether absent class members could be

ascertained from GEICO's records, the district court did not resolve that dispute or make a clear finding on the ascertainability requirement. By kicking the ascertainability requirement down the road, the district court failed to identify absent class members in a timely manner, robbing them of a meaningful opportunity to opt out. The court compounded that error when it refused to decertify the class even though it became clear that the identities of absent class members could not be gleaned from GEICO's records without undertaking a contested, individualized review of potentially thousands of files.

ARGUMENT

I. The Court's Ascertainability Requirement Flows Directly From Several of Rule 23's Essential Provisions.

This Court has held on many occasions that Rule 23 imposes a requirement that a proposed class must be "adequately defined and clearly *ascertainable*." *Little*, 691 F.3d at 1304 (emphasis added); *Karhu*, 621 F. App'x 945; *Bussey*, 562 F. App'x at 787. In unpublished decisions, this Court has further held that this requirement obligates courts to ensure—*before* certifying a class—that there is an "administratively feasible way" for identifying absent class members that "does not require much, if any, individual inquiry." *Karhu*, 621 F. App'x at 946–48 (affirming district court's refusal to a certify a class when there was no

administratively feasible way to identify absent class members); *Bussey*, 562 F. App'x at 787 (class definition must include only those class members that could be easily identified using undisputed records). The Court should take this opportunity to publish a decision explaining why this important ascertainability requirement is rooted in Rule 23's provisions.

A. Identifying Absent Class Members Is Essential To Performing The Rigorous Analysis Required Under Rule 23.

Ascertainability is "an 'essential' element of class certification" that is necessarily "implied" and "encompassed" by many of Rule 23's provisions. 1 Newberg on Class Actions § 3:2 (5th ed.) (Newberg). Unless absent class members are readily identifiable, the court cannot perform the rigorous analysis that Rule 23 requires.

A Class Must Be Ascertainable for The Court To Ensure Compliance With Rule 23(a). Consider Rule 23(a), which sets out the familiar prerequisites for certifying a class action: "*the class*" must be "so numerous that joinder of all members is impracticable"; there must be "questions of law or fact common to *the class*"; "the claims or defenses of the representative parties [must be] typical of the claims or defenses of *the class*"; and "the representative parties [must] fairly and adequately

protect the interests of *the class*." Fed. R. Civ. P. 23(a) (emphases added). The rule's repeated use of the word "class" leaves no doubt that the act of certifying a class action presupposes the existence of an actual, identifiable "class." 7A Wright & Miller, Fed. Prac. & Proc. Civ. § 1760 (3d ed.) ("an essential prerequisite of an action under Rule 23 is that there must be a 'class'").

If a district court does not first ensure that there is an administratively feasible way to identify absent class members, it faces an unworkable task when it attempts to analyze Rule 23(a)'s requirements. For example, courts "must be able to know who belongs to a class before they can determine the numerosity of the class, the commonality of the claims of the class members, or any of the other class certification prerequisites." 1 Newberg § 3:2. A court cannot determine whether a class is "so numerous that joinder of all members is impracticable," Fed. R. Civ. P. 23(a)(1), unless it can first accurately estimate how many members are in the class. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267–68 (11th Cir. 2009) (concluding that numerosity requirement was not satisfied because there was no actual evidence of the number of persons that would comprise the class). Nor can a court determine whether there are "questions of law or fact common

to the class," Fed. R. Civ. P. 23(a)(2), unless it first finds that the "class members 'have suffered the same injury.'" *Dukes*, 564 U.S. at 350 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982)). Evaluating the injuries of absent class members is infeasible until the class members are identified. Only then can a court determine—as it must—whether common questions will generate "common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350, 356–57.

Without an administratively feasible method for identifying class members, a court is also prevented from performing other tasks that Rule 23 mandates. For example, identifying *who* the class members are is an essential prerequisite to determining whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class" or that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(3)–(4). These "typicality" and "adequacy" prerequisites ensure that "a sufficient nexus exists between the claims of the named representatives and those of the class at large," *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000), but a district court cannot determine whether that nexus exists if it is not in a position to assess the actual claims and circumstances of the other would-be class members. Without identifying

the absent class members and their claims, a district court cannot ensure that "the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Id.* (internal quotation marks omitted); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (these inquiries "serve[] to uncover conflicts of interest between named parties and the class they seek to represent").

Identifying Absent Class Members Is Especially Important When The Class Seeks Damages. For class actions that seek a damages recovery (like this one), the requirement that the class be "clearly ascertainable," *Little*, 691 F.3d at 1304, is also properly understood as part and parcel of two other express textual requirements: superiority and predominance. *See* Fed. R. Civ. P. 23(b)(3). 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). Similarly, 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." Fed. R. Civ. P. 23(b)(3). Ascertainability

"overlaps with" these inquiries 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.); *see also Marcus v. BMW of N. America, LLC*, 687 F.3d 583, 591 (3d Cir. 2012) (ascertainability is part of Rule 23(b)(3)'s requirement that common issues of law or fact "predominate" over individual issues of law or fact).

A Class Must Be Ascertainable for The Court To Ensure Compliance With Rule 23(c). The ascertainability requirement also flows from Rule 23(c). Rules 23(c)(1) and (2) require a court certifying a class to issue an "order" that "define[s] the class and the class claims, issues, or defenses" and issue a judgment that "include[s] and describe[s] those whom the court finds to be class members." Fed. R. 23(c)(1)(B), (c)(3)(A)–(B). Again, a court must first determine which persons are members of the class before it can define the class or describe the class members. For this reason, several courts have read Rule 23(c) to "contain the substantive obligation that the class being certified be ascertainable." 1 Newberg § 3:2; *see, e.g., Riedel v. XTO Energy, Inc.*, 257 F.R.D. 494, 506 (E.D. Ark. 2009) ("Rule 23 requires that any order certifying the class 'must define the class'"); *Benito v. Indymac Mortg. Servs.*, No. 2:09-CV-

001218-PMP-PAL, 2010 WL 2089297, at *2 (D. Nev. May 21, 2010) (Rule 23(c)(1)(B) provides persuasive authority for maintaining the ascertainability requirement).

The ascertainability requirement is particularly important in connection with Rule 23(c)'s provisions pertaining to opt-out rights for putative members of class actions seeking damages. In these types of class actions, courts must provide the "best notice that is practicable under the circumstances," directing that notice to "all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Marcus*, 687 F.3d at 593 (the ascertainability requirement "protects absent class members by facilitating the 'best notice practicable' under Rule 23(c)(2) in a Rule 23(b)(3) action"); *see also Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173–177 (1974) (individual notice to class members identifiable through reasonable effort is mandatory in (b)(3) actions and this requirement may not be relaxed based on high cost). But how can a court determine the "best notice" without a meaningful up-front effort to ascertain the actual members of the class? It cannot.

The requirement that a class be ascertainable also effectuates Rule 23(c)'s command that class judgments bind absent members "whether or not favorable to the class." Fed. R. Civ. P. 23(c)(3)(B); Fed. R. Civ. P.

23(c)(2)(B)(vii) (Rule 23(b) classes have a "binding effect" on class members). When a court fails to apply the ascertainability requirement, it opens the door to the risk of a "fail-safe" class—i.e., a class "defined such that membership in the class is contingent on the validity of the class members' claims"—that would never be bound by an adverse judgment. Erin L. Geller, *The Fail-Safe Class As an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769, 2783 (2013). In such cases, the absent class members are not ascertainable until liability is established because the class's very existence depends on the class winning. *Id.* at 2808–09. Putative members of a fail-safe class are never "bound by an adverse judgment because they either win or, if they lose, are no longer part of the class" and therefore can bring the lawsuit again in their own individual capacities. *Id.* at 2783; *see also In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 n.19 (1st Cir. 2015) ("[A] fail-safe class is one in which 'it is virtually impossible for the Defendants to ever "win" the case, with the intended class preclusive effects.'").

The surest way to ensure that class judgments bind absent class members—"whether or not" the judgment is "favorable to the class" Fed. R. Civ. P. 23(c)(3)(B)—is to apply a meaningful ascertainability test at the certification stage. Administratively feasible methods for

determining who meets objective criteria for class membership allow the court to police this specific abuse of the class action procedure and to ensure that class certification decisions accord with the text of Rule 23.

B. The Named Plaintiff Must Prove That There Is An Administratively Feasible Method For Identifying Absent Class Members.

Because the ascertainability requirement is rooted in Rule 23's express provisions, it follows that the plaintiff "bears the burden" of proving that there is "an administratively feasible method by which class members can be identified." *Karhu*, 621 F. App'x at 947. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes,* 564 U.S. at 348 (internal quotation marks omitted). To justify that exception, the party seeking to certify a class must "affirmatively demonstrate" that the proposed class complies with Rule 23, including proving ascertainability. *Id.*at 350. As the Supreme Court has emphasized, "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. 258, 275 (2014) (emphasis in original).

Determining the identities of absent class members is a necessary means to "ensure[] that a proposed class will actually function as a class." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 162 (3d Cir. 2015). Accordingly, when a plaintiff contends that the court can identify class members using the defendant's records, Rule 23 requires her to actually "establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible" in a manner "that does not require much, if any, individual inquiry." *Karhu*, 621 F. App'x at 948, 946. If the plaintiff cannot prove that membership can confidently be assessed based on records not reasonably subject to dispute, then it is impossible for the court to make the requisite findings that the proposed class meets Rule 23's requirements. In those situations, a court should not bypass this requirement simply to make class treatment "work." Instead, it should deny class certification.

II. The District Court Abused Its Discretion When It Gave Short Shrift to The Ascertainability Requirement.

The district court in this case failed to hold plaintiff to her burden of establishing that there was an administratively feasible way of identifying class members. It neither treated the ascertainability requirement as a prerequisite to considering Rule 23(a) and (b)(3)'s express requirements, nor did it make a clear finding about whether

there was an administratively feasible way to identify absent class members. Instead, the district court buried its discussion of ascertainability in a one-sentence footnote in the section of its opinion discussing Rule 23(a)(2)'s "commonality" requirement. After stating that "[c]ommonality has been satisfied" because plaintiff "proffered a uniform methodology to identify total loss leased vehicles" using GEICO's records, the court dropped a footnote asserting that this proffer "also supports ascertainability, *i.e.*, that Plaintiff will be able to identify the class members by reference to objective criteria in an administratively feasible way." Dkt. No. 165 at 7 & n.1. But the district court stopped short of determining that the records were "in fact useful for identification purposes, and that identification will be administratively feasible." *Karhu*, 621 F. App'x at 948.

The lack of a clear finding on ascertainability reflects that the district court did not understand its job to ensure that class members were easily identifiable *before* certification, including by resolving expert disputes if necessary. Most of the records in this case are sealed, but GEICO's 23(f) petition and plaintiff's opposition show that the parties dispute whether GEICO's records were useful in ascertaining class members in a way that would require little-to-no individualized

determinations. Instead of engaging in the requisite rigorous analysis regarding the nature of those documents or the parties' disputes before certifying the class, the district court engaged in no analysis at all. By "refusing to entertain arguments against . . . the propriety of class certification . . . the [district court] ran afoul of . . . precedents requiring precisely that inquiry." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–35 (2013) (district court abused its discretion in failing to consider arguments about whether experts could measure damages on a classwide basis before it certified a class); *see also Dukes*, 564 U.S. at 350–51 (similar ruling).

The district court's subsequent order denying GEICO's motion to decertify the class further reflects its confusion. *See* Dkt. No. 267. Rule 23(c)(1) makes clear that, "[e]ven after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *Falcon*, 457 U.S. at 160. After the court issued its certification order, GEICO moved for decertification claiming that each of approximately 3,200 insureds' claims files would need to be checked individually to determine whether each of those persons were, in fact, class members. Dkt. No. 255. Rather than decertify the class, however, the district court concluded that the action was still "appropriately

resolved on a class-wide basis" even though individual files of 3,200 absent class members would have to be "double check[ed]." Dkt. No. 267 at 3. That type of individualized inquiry is directly contrary to Rule 23's requirement that a plaintiff must be able to identify class members without resort to "much, if any, individual inquiry." *Karhu*, 621 F. App'x at 946; *cf. Comcast*, 569 U.S. at 34, (district court abused its discretion in certifying a class where model fell far short of establishing that damages were capable of measurement on a classwide basis).

Together the district court's two decisions dealt a devasting one-two punch to both GEICO and the absent class members. The class certification requirements of Civil Rule 23 are not mere conveniences for streamlining litigation, but crucial safeguards grounded in fundamental due-process concerns. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). But the court violated Rules 23(a) and (b)(3)'s command that, before certification, it must ensure that claims that turn on individual facts will be litigated individually. *E.g.*, *Comcast*, 569 U.S. at 34–35. And it compounded that error when it refused to decertify the class despite acknowledging that the class could not be ascertained without resort to potentially thousands of individualized inquires. Its failure to ascertain the identity of class members before certification also robbed absent class

members of making a meaningful decision of whether to opt out. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999) (due process requires that absent class members obtain notice and an opportunity to remove themselves from the class).

CONCLUSION

The Court should reverse the district court's decision to certify the class. In doing so, it should take this opportunity to explain in a published decision that the plain text of Rule 23's provisions embraces a view of the ascertainability doctrine that requires named plaintiffs to prove that there is an administratively feasible way of identifying absent class members before a court should certify a class.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(g)(1), Fed. R. App. P. 32(a)(7)(B), and Fed. R. App. 29(a)(5) because this brief contains 4,134 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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