No. _____

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DIANA MEY

Plaintiff/Respondent,

vs.

LIBERTY HOME GUARD, LLC and BENJAMIN JOSEPH

Defendants/Petitioners.

Appeal from the United States District Court
For the Northern District of West Virginia, Wheeling Division
Civil Action File No. 5:23-cv-281 (Bailey, J.)

PETITION FOR PERMISSION TO APPEAL FROM ORDER GRANTING CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23(f)

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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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- 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.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. _____ Caption: Mey v. Liberty Home Guard, LLC & Benjamin Joseph

Pursuant to FRAP 26.1 and Local Rule 26.1,

Benjamin Joseph
(name of party/amicus)

who is Petitioner-Defendant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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/ Ryan D. Watstein Date: Dec. 17, 2025

Counsel for: Benjamin Joseph

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. _____ Caption: Mey v. Liberty Home Guard, LLC & Benjamin Joseph

Pursuant to FRAP 26.1 and Local Rule 26.1,

Liberty Home Guard, LLC
(name of party/amicus)

who is Petitioner-Defendant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Ryan D. Watstein Date: Dec. 17, 2025

Counsel for: Liberty Home Guard

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INTRODUCTION

Every factor this Court considers weighs heavily in favor of granting this petition for Rule 23(f) review. The district court's Order certifies a TCPA damages class where everyone but the named plaintiff consented to the calls at issue. It presents several novel questions of exceptional importance that recur across class actions generally, including questions regarding Article III and representational standing and pre-certification waiver of defenses against absent class members.

The Order is manifestly erroneous, resting on legal conclusions that conflict with binding precedent. It excludes, rather than "rigorously analyzes," core evidence that, if considered, establishes that Plaintiff failed to satisfy Rule 23. And it imposes classic death-knell pressure by converting a one-off error into a class trial structure that virtually guarantees a multi-billion-dollar judgment. If this Court denies review now, this case—and possibly Defendants' business—will end, and the important, recurring questions raised in this petition will evade review.

This case's posture underscores the need for immediate review. Plaintiff Diana Mey's claim arises from a single mistake: a third party's typographical error. Every other putative class member entered Liberty Home Guard's system by affirmatively requesting information. Over six years, they navigated through dozens of web-based pathways that evolved over time. As a result, the absent class members

are subject to individualized defenses: consent, established-business-relationship exemptions, business-line exclusions, and arbitration agreements.

Notwithstanding that, the district court certified a nationwide class of millions without addressing how a named plaintiff who shares none of those characteristics could litigate TCPA claims on their behalf. That ruling conflicts with this Court's and the district court's own decisions. Those cases recognize that such representational mismatches defeat standing, typicality, and adequacy.

The path the district court took to reach that result compounds the errors. Rather than weighing the full record as Rule 23 requires, the court adopted—verbatim, down to the typos—arguments raised for the first time in Plaintiff's reply. On that basis, it excluded broad categories of evidence as "untimely," including evidence identified at the outset of the case and evidence gathered after the filing of the class-certification motion. The court also held that Defendants waived arbitration as to absent class members, even though waiver cannot occur before a defense is available. The court also shifted Rule 23's burden by treating the absence of defense evidence—which the court excluded—as proof that Plaintiff carried *her* burden.

These procedural and doctrinal errors have concrete and constitutional consequences. By refusing to consider vast evidence of individualized defenses, the Order converts a single wrong-number claim into a class action worth more than $10 billion in statutory damages. It does so by permitting a plaintiff whose claim cannot

be challenged on those grounds to serve as the stand-in for a class whose claims turn on them. That effectively forecloses Defendants from litigating defenses that go to the heart of class members' entitlement to relief.

The result is a trial structure that effectively guarantees a company-ending judgment untethered from the merits of absent class members' claims and that awards statutory damages to individuals who have no claim and suffered no concrete harm. That outcome conflicts with *TransUnion* and *Alig v. Rocket Mortgage*, and with Rule 23 precedent requiring courts to confront, rather than bypass, evidence showing that a proposed class includes uninjured persons.

Rule 23(f) exists for precisely this situation. The Certification Order imposes classic death-knell pressure, nullifies arbitration rights Congress requires courts to enforce, and raises questions of exceptional importance that recur across class actions of every kind. Because these errors will otherwise evade review and become entrenched, this Court should grant the petition and reverse the Certification Order.

STATEMENT OF CASE

This case concerns the certification of a nationwide do-not-call class under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(c)(5).[1] The law prohibits more than one telephone call within 12 months to any residential—not

[1] Plaintiff's Amended Complaint also alleges that Defendants violated the WVCCPA, W. Va. Code § 46A-6F-601(a). Only the TCPA claim and its damages are referenced in Plaintiff's class certification briefing and the Order. *See* Exhibit 1, Certification Order.

business—number listed on the National Do-Not-Call Registry (the "Registry"). 47 C.F.R. § 64.1200(c)(2). Consent is a complete defense, and an inquiry or sale creates an "existing business relationship" ("EBR") exemption that lasts for 3 or 18 months, respectively. 47 U.S.C. §§ 227(a)(4); 47 C.F.R. § 64.1200(c)(2), (f)(5). Plaintiff's class claims are based on calls and texts Liberty sent in response to inquiries that consenting consumers made directly or on third-party sites about Liberty's home warranties. Dkt. 44.

Liberty does not cold call; consumers ordinarily enter Liberty's lead-management system by affirmatively seeking information from Liberty or its marketing partners. Dkt. 95-4, First Joseph Decl., ¶ 6. But Plaintiff's claim arose from a different circumstance: a typo. Dkt. 95-5, Skadra Aff. Liberty contacted Plaintiff because a consumer mistakenly transposed two digits and entered Plaintiff's number on Liberty's website instead of his own. *Id.*

Because of this, Plaintiff never consented to be contacted or agreed to any terms of use. Dkt. 44 ¶¶ 14, 19, 23. By contrast, the absent class members affirmatively requested information, consented to contact, provided contact details, and assented to applicable terms governing those interactions, including arbitration provisions. *See, e.g.*, Dkt. 115-9, Bustamente Decl. (visited website and submitted inquiry); ECF No. 93-1, Joseph Dep. at 43:9–11 (testifying that Liberty calls consumers who've submitted an inquiry and consented to be contacted).

In the last 5 years, Plaintiff Diana Mey has filed 15 of the 18 TCPA actions filed in the Northern District of West Virginia. Ninety-five percent of those 18 cases were assigned to Judge Bailey, who has never denied class certification in a TCPA case.[2] Compared to the national average, litigants in front of Judge Bailey are twice as likely to have *any* class certified—and certification is almost guaranteed in a TCPA case.[3] This statistical anomaly has and is contributing to a growing body of unreviewed district court decisions addressing TCPA class actions within the Fourth Circuit. And once class certification is granted, the defendants settle, regardless of merit, precluding review of the class certification decisions.

Plaintiff filed suit on July 14, 2023. Dkt. 1-1. She amended her complaint on August 14, 2024, to assert class claims and add Liberty's co-CEO, Benjamin Joseph, as a defendant. Dkt. 44. Following the close of discovery, Plaintiff moved to certify a nationwide class of individuals whose residential numbers were on the Registry but received two or more calls from Liberty within 12 months. Dkt. 93 at 9.

Defendants opposed certification, presenting evidence that: (1) Liberty's business process involved no cold-calling and thus it did not call consumers who did not first request contact, absent something like the typo that impacted Plaintiff;[4]

[2] *See* Exhibit 2 (TCPA cases filed in the Northern District of West Virginia since January 2020).

[3] *See* Exhibit 3 (WestLaw Litigation Analytics, tracking class certifications).

[4] For each online consumer inquiry, the information entered is captured and imported into Liberty's lead-management software, which then prompts follow-up by Liberty's representatives. Dkt.

(2) arbitration provisions applied to most absent class members but not to Plaintiff and thus she lacked the requisite standing, typicality, and adequacy to represent the class; (3) individualized defenses predominated, including consent, EBRs, arbitration, and line-type inquiries; and (4) Plaintiff's expert's proposed methodology (which this Circuit recently excluded) could not identify class members.

Defendants supported their opposition with citations to deposition testimony from Mr. Joseph, documents, written discovery responses, and declarations obtained from putative class members, Liberty's marketing partners, and Liberty itself. *See generally*, Dkt. 115 & attachs. In reply, Plaintiff failed to cite any classwide evidence or aggregate records that she could use to resolve Defendants' individual defenses to each class member's claim. Dkt. 128. Instead, she argued that Defendants' evidence should be excluded as untimely—even though she had had some of the information for more than a year and every opportunity to depose Defendants, subpoena third parties, and seek consumer declarations herself. *Id.* at 1–2.

Despite this record, the district court quickly certified a nationwide class, copying-and-pasting Plaintiff's factual assertions and legal conclusions verbatim,

115-4, Blaski Decl., ¶¶ 5–6. There are thus no "executed webforms," as the court speculated (at 20).

down to the typos.[5] Dkt. 139. The Order contains no independent analysis of the Rule 23 requirements or Defendants' individualized defenses. It instead dispensed with one hurdle by copying Plaintiff's argument that Defendants waived their right to enforce the arbitration agreements that don't even apply to Plaintiff. Dkt. 139 at 21–22. The court then excluded the Defendants' evidence attached to its opposition by copying and pasting Plaintiff's incorrect reply argument. *Id.* at 18–20. With defenses waived and evidence excluded or ignored, the district court found that Plaintiff satisfied Rule 23—*based on evidence that Plaintiff (wrongly) claimed Defendants never produced*.

In doing so, the district court ignored its own recent decisions and binding precedent from this Court—including recent decisions reversing the district court's prior certification grants. And while certifying a class of almost entirely uninjured consenting persons, the district court failed to even mention Article III standing.

Defendants now seek leave to file an immediate appeal.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction under 28 U.S.C. § 1331 because Plaintiff asserts claims under the TCPA, 47 U.S.C. § 227. On December 3, 2025, the court granted Plaintiff's motion for class certification. Defendants timely filed this

[5] *Compare* Order, Dkt. 139 at 18–21, *with* Dkt. 128 at 1–4 & n.1, 8–9), *and* Dkt. 94; *see also* Exhibit 4 (highlighting portions of the order that were copied, verbatim, from Plaintiff's opening brief (in yellow) and her reply brief (in green)).

petition on December 17, 2025, under Federal Rule of Civil Procedure 23(f) and Federal Rule of Appellate Procedure 5. If permission to appeal is granted, this Court will have jurisdiction under 28 U.S.C. § 1292(e) and Rule 23(f).

QUESTIONS PRESENTED

1. Whether a district court satisfies Rule 23's "rigorous analysis" requirement when it: (a) adopts plaintiff's briefing nearly verbatim; (b) excludes or ignores defense evidence instead of weighing it; and (c) relies on plaintiff's assumptions rather than factual findings.

2. Whether a district court errs by certifying a TCPA do-not-call class comprised almost entirely of individuals who suffered no Article III injury because they consented to defendants' calls but whose sole class representative was called only because of an error and, unlike the rest of the class, did not consent to calls, make an inquiry, have an EBR, waive class actions, or agree to arbitrate.

3. Whether a district court errs when it holds defendants "waived" arbitration as to absent class members when plaintiff did not have an arbitration agreement and defendants produced the terms of use containing the relevant agreements in discovery and raised arbitration in opposition to class certification.

RELIEF REQUESTED

This Court should grant the Petition for Review under Rule 23(f), reverse the District Court's Order granting Plaintiff's motion for class certification, and direct the District Court to enter an order denying class certification.

STANDARD FOR GRANTING REVIEW

This Court has "unfettered discretion" to allow an appeal from an order granting class certification based on "any consideration that [it] finds persuasive." Fed. R. Civ. P. 23(f), Adv. Comm. Note. This Court typically considers "whether the certification ruling is likely dispositive," whether it "contains a substantial

weakness," whether "appeal will permit the resolution of an unsettled legal question of general importance," "the nature and status of the litigation," and "the likelihood that future events will make appellate review more or less appropriate." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001). The "substantial weakness" factor "operates on a sliding scale to determine the strength of the necessary showing regarding the other . . . factors." *Id.* at 145–46. The weaker the order, the less important the other factors become. *Id.*

All factors strongly favor review here.

REASONS FOR GRANTING THE PETITION

I. The Certification Order Is a Classic "Death Knell," Threatening Ruinous Exposure and Distorting the Litigation Posture.

This case presents a classic "death-knell" scenario in which "potential damages liability and litigation costs" would force Defendants to consider "abandon[ing] a meritorious defense" because settlement is more "economically prudent." *Microsoft Corp. v. Baker*, 582 U.S. 23, 29 (2017). The Fourth Circuit has recognized the death-knell paradigm as warranting Rule 23(f) review, in line with other Circuits. *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 356–57 (4th Cir. 2014); *see also Nat'l ATM Council v. Visa*, 2023 WL 4743013, at *5 (D.C. Cir. July 25, 2023); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000) (identifying as "most important" whether the ruling creates a "death knell" because "defendant would feel irresistible pressure to settle").

Here, the Order transforms one person's wrong-number claim arising from a typo into a class encompassing millions of calls and texts. The Order itself (at 2–4, 11–12) establishes its magnitude: When the millions of contacts are multiplied by statutory damages of $500 to $1,500 per violation, the resulting exposure—over $13 billion—creates overwhelming settlement pressure irrespective of meritorious defenses. For a small business and its co-founder, that is an existential threat—Defendants could not survive even one percent of that judgment. The Order thus forces either an immediate settlement divorced from the merits and with no judicial review, or a catastrophic financial risk with an expensive trial that alone could bankrupt the company, regardless of the outcome.

The statistics bear out that a failure to grant immediate review would be the death knell: For at least the past five years, ***every*** TCPA class certified in the Northern District of West Virginia has settled before appeal, ensuring no appellate oversight of recurring class-certification issues. That is especially problematic when the district judge who issued the Order is assigned all TCPA class actions and has a 100% grant rate. Compounding that further is that Plaintiff has filed 18 TCPA cases in that District, but none of her class claims have been reviewed by this Court. Interlocutory review is necessary to ensure that the recurring and consequential issues raised below receive appellate guidance.

Lienhart's related fourth factor—case posture—similarly compels immediate review. *See Lienhart*, 255 F.3d at 144 (identifying fourth guidepost as "the nature and status of the litigation before the district court"). And most importantly, the district court all but guaranteed with its Order that any trial can only result in a verdict for the Plaintiff. The district court has excluded Defendants' evidence (as discussed below) and has already held that the witnesses will be limited to Plaintiff, Defendant Joseph, and Plaintiff's expert. *See* Dkt. 139 at 18. This denies Defendants the due process right to present their primary defenses (just like Defendants were prevented from doing in their motion for summary judgment), since they don't apply to the Plaintiff.

Immediate review is the only way to prevent this manifestly unjust outcome and ensure the important and recurring issues herein receive review.

II. The Certification Order Fails to Conduct a "Rigorous Analysis," Resulting in Substantial Legal and Analytical Weaknesses.

In *Lienhart*, this Court held that "[i]n extreme cases, where decertification is a functional certainty, the weakness of the certification order may alone suffice to permit the Court of Appeals to grant review." 255 F.3d at 144 (considering only that factor). This case is more "extreme" than *Lienhart*: the multiple "substantial weaknesses" identified below, highlighted by the lower court's complete abdication of its "rigorous analysis" role, each suffice as a basis for interlocutory appeal.

A. The Order Fails to Assess Article III Standing.

The Court should permit this appeal because the Order certifies a class of primarily uninjured persons, with no classwide way to remove them, without even mentioning Article III standing. Under *TransUnion LLC v. Ramirez*, "only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue in federal court," as "standing is not dispensed in gross." 594 U.S. 413, 427, 431 (2021). This Court has applied *TransUnion* to require a meaningful factual showing that each class member suffered a concrete injury before a Rule 23(b)(3) damages class may be certified. *Alig v. Rocket Mortg., LLC*, 126 F.4th 965, 975 (4th Cir. 2025) (reversing certification). Where classwide proof cannot exclude uninjured individuals, certification is improper because a federal court "lacks the power" to award damages to uninjured plaintiffs. *Id*. at 975.

The Certification Order does not even acknowledge this threshold constitutional constraint. That alone was error. That error is compounded by the record the court acknowledged but then refused to consider. Liberty's testimony, corroborated by third-party lead websites and declarations from putative class members themselves, established that Liberty calls only consumers who consented and wanted contact—consumers who testified they were not injured. *Compare Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1272 (11th Cir. 2019) (no Article III standing for class members who did not revoke their consent to calls), *with Melito*

v. Experian Mktg. Sols., Inc., 923 F.3d 85, 94 (2d Cir. 2019) (finding Article III standing existed because texts were "unsolicited"). Rather than assess the constitutional significance of that evidence, the court adopted Plaintiff's reply-only argument that it was "untimely," excluded it, and certified a class anyway.

That was clear legal error. Article III standing is nonwaivable, and courts must consider evidence bearing on whether injury can be resolved on a classwide basis. *TransUnion*, 594 U.S. at 431 ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."); *Alig*, 126 F.4th at 975 (rejecting class certification based on presumption or theory of injury unmoored from evidence of concrete harm). Certifying a damages class that includes large numbers of uninjured individuals, with no mechanism to identify or exclude them, is constitutionally impermissible and presents the kind of "substantial weakness" warranting immediate Rule 23(f) review. *Lienhart*, 255 F.3d at 146–47.

B. Plaintiff Lacks Representational Standing, Typicality, and Adequacy.

Plaintiff's dissimilarity to the class also presents serious due process problems warranting review. This chart shows the prime differences:

Plaintiff's Atypicality

	Plaintiff Diana Mey	Absent Class Members
Arbitration Agreement	No	**Majority**, if not all, but may dispute individually
Class Action Waiver	No	**Majority**, if not all, but may dispute individually
Consent to Contact	No	**All**, but may dispute individually
Inquired about Liberty's services and provided personal information	No	**All**, but individual assessment for existing EBR at time of each contact
Contacted by mistake	**Yes**	No evidence of this
Revocation of Consent to Contact	**Abandoned this issue**	Possible argument but individualized inquiry required

As this chart establishes, "proof of the representative's claims would not necessarily prove all class members' claims," so "typicality is lacking." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466–67 (4th Cir. 2006). Yet, the district court—copying-and-pasting Plaintiff's argument—incredibly held: "With no unique defenses and a claims theory indistinguishable from that of absent class members, Mey's claims are an ideally-representative example of the class. Typicality is thus readily satisfied." *Compare* Dkt. 139 at 15, *with* Dkt. 94 at 12. This finding warrants review and reversal.

As Judge Bailey himself recently explained in a decision denying certification—which he failed to cite below—a plaintiff not subject to arbitration "is unable to make the arguments that a typical and adequate class representative would be able to" because she lacks standing to challenge the enforceability of arbitration

agreements binding others. *Yoho v. Southwestern Energy Co.*, 2024 WL 5454530, at *9–10 (N.D. W. Va. Nov. 12, 2024). This Court has likewise recognized that defendants have a right to present individualized defenses, including contractual defenses. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 324 (4th Cir. 2006).

Rather than apply or even cite *Yoho*, the district court avoided the issue by holding that Defendants waived arbitration. That ruling is erroneous. Absent class members are not parties before certification, and a defendant cannot waive defenses that are not yet available. *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011). Judge Bailey himself so held in *Vance v. DIRECTV, LLC*—another case he failed to cite below. 2022 WL 16857329, at *2 (N.D. W. Va. 2022). And this Court recently reaffirmed this principle and reversed Judge Bailey in *Maldini v. Marriott International, Inc.*, holding that arbitration and class-waiver defenses must be evaluated at certification and are not forfeited by failing to raise them earlier. 140 F.4th 123, 130–31 (4th Cir. 2025).

The Order reached the opposite conclusion, holding that Liberty waived arbitration because it "fail[ed] to timely raise the issue prior to class certification." In doing so, it did not cite, apply, or distinguish any of this authority, except to copy-and-paste Plaintiff's mischaracterization of *Maldini* in her reply brief as *supporting* Plaintiff's arbitration forfeiture argument. *Compare* Dkt. 139 at 22, *with* Dkt. 128 at 10 n.8 (both citing *Maldini* with parenthetical: "recognizing that a defendants [sic]

risk waiving arbitration under such circumstances but finding waiver inapplicable on the facts presented"). The court also ignored that Liberty produced the relevant arbitration and class waiver provisions in discovery long ago. *See* Liberty's Discovery Responses, Dkt. 115-5, at 43–54.

Had the district court applied controlling precedent, it would have concluded (as it did in *Vance*) that Defendants did not forfeit arbitration and that the "mere potential" applicability of arbitration agreements defeats certification because it presents individualized questions the named plaintiff lacks standing to litigate. *Yoho*, 2024 WL 5454530, at *10; *Maldini*, 140 F.4th at 131; *Vance*, 2022 WL 16857329, at *2. That's particularly true given the delegation provisions in the arbitration clauses at issue. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010) (court *must* treat delegation provision as valid, "leaving any challenge to the validity of the [arbitration agreement] as a whole for the arbitrator").

In sum, the Certification Order warrants interlocutory review because it rests on a named plaintiff who is concededly atypical and lacks standing to litigate absent class members' contractual obligations. The court's failure to conduct the latter analysis—and its wholesale nullification of third parties' contractual rights through waiver—presents a particularly recurring, structural error favoring immediate Rule 23(f) review. *See*, *e.g.*, *Maldini*, 140 F.4th at 130-31 (reversing Judge Bailey for

similar finding); *In re Checking Account Overdraft Litig.*, 780 F.3d 1031, 1039 n.10 (11th Cir. 2015) (arbitration not justiciable until after certification).

C. The Order Inverts Rule 23(b)(3)'s Burden and Conducts No "Rigorous Analysis" to Conclude Plaintiff Established Predominance and Ascertainability.

The Order also warrants review because it certified a nationwide damages class without requiring Plaintiff to carry her Rule 23 burden.

1. The District Shifted Burdens and Avoided a "Rigorous Analysis."

A plaintiff seeking class certification bears the burden of affirmatively demonstrating compliance with Rule 23 through evidence, not speculation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "[I]t is *not the defendant* who bears the burden of showing that the class *does not comply* with Rule 23." *Thorn*, 445 F.3d at 321. The district court likewise has an independent obligation to conduct a "rigorous analysis" and make findings based on the record. *Glover v. EQT Corp.*, 151 F.4th 613, 618 (4th Cir. 2025); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006).

The district court failed to do so here. Rather than engage with Defendants' evidence, the court copied large portions of its Order verbatim from Plaintiff's briefing and rested its predominance ruling on assumptions about *hypothetical* "webforms," "centralized records," and "overarching processes," without resolving any factual disputes. It made no findings regarding variation in consent, formation

of existing business relationships, mixed-use lines, arbitration agreements, or differing Terms of Use.

That failure is dispositive. Courts routinely deny class certification where consent alone turns on individualized inquiries. *See, e.g.*, *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 328–29 (5th Cir. 2008) (reversing certification where plaintiff failed to show classwide proof of lack of consent); *Davis v. Capital One, N.A.*, 2023 WL 6964051, at *9, *15 (E.D. Va. Oct. 20, 2023), *aff'd* 2025 WL 2445880 (4th Cir. Aug. 26, 2025) (affirming denial of certification where individualized consent inquiries predominated). Here, the case presents not just individualized consent issues, but multiple layers of individualized proof—including EBR formation, arbitration and class-waiver agreements, and mixed-use lines—any one of which defeats predominance.

Liberty introduced extensive, unrebutted evidence establishing precisely those individualized issues. The chart below summarizes the stark difference between Plaintiff's conjecture and Defendants' layers of actual evidence:

[Table on Following Page]

Defendants' Evidence	Plaintiff's "Evidence"

• Joseph's repeated testimony that Liberty calls only consenting consumers. Joseph Dep. 43:9–11; 1st Joseph Decl., Dkt. 95-4 ¶ 6; 2d Joseph Decl., Dkt. 134-1 ¶ 7
• Liberty's Discovery Responses, Dkt. 115-5:
  ○ explaining consent process;
  ○ identifying all contacted consumers as having given consent and created EBRs; and
  ○ producing Terms of Use, including arbitration agreement and class waiver
• Terms of Use, Dkt. 134-1 at 28-41
• Consent-to-contact language on Liberty's webpages, Dkt. 134-1 at 15
• Skadra Affidavit and lead data, Dkts. 95-5; 134-1 at 54–62 (showing consumer's provided data with Plaintiff's number)
• A dozen declarations from putative class members, Dkt. 115-6 through 115-9, 115-14 through 115-21.
• Declarations of third-party lead generators, Dkt. 115-10, 115-11
• Call data for those called with consent, LIBERTY000155
	• Speculation in a reply brief that Liberty "purchas[es] cheap leads from an unscrupulous third party." Dkt. 128 at 19
	• Unauthenticated and unauthentic screenshots from Wayback Machine, Dkt. 128-4
	• Unspecified references to Defendants' hypothetical "webforms" and other business records

Instead of weighing that record, as Rule 23 requires, the district court excluded Defendants' evidence as "untimely," even though it directly addressed Rule 23 elements that *Plaintiff* bore the burden of proving and was based largely on

information long known to Plaintiff. That approach contravenes settled precedent forbidding courts from "merely accepting" a plaintiff's representations and thereby "defaulting on the important responsibility conferred by Rule 23." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004).

On this record, predominance necessarily fails. Rule 23 requires that liability be resolved "in one stroke," *Dukes*, 564 U.S. at 350, but where consent alone requires individualized inquiry, that is impossible. By excluding evidence that conclusively established numerous individualized defenses, the district court relieved Plaintiff of her burden and guaranteed a distorted Rule 23 analysis—presenting another recurring legal error that warrants immediate Rule 23(f) review.

2. The District Court Erred in Finding a Class Ascertainable.

The Fourth Circuit also requires an administratively feasible method for identifying class members. *Adair*, 764 F.3d at 358–59. But the class the district court lifted from Plaintiff's briefing has several requirements of membership that can only be resolved by individualized inquiries.

Take the requirement that class members have "residential" (and not business) lines. This Circuit has affirmed that wireless numbers used for business cannot be reliably classified through database lookups, and thus such determinations are highly individualized. *Davis*, 2023 WL 6964051, at *9, *15, *aff'd* 2025 WL 2445880.

Rather, as the Ninth Circuit explained,[6] to determine whether a number is "residential," the court would have to individually inquire into: (1) how the user holds out the number; (2) to whom it is registered; (3) the degree of business use; (4) who pays the bill; and (5) other context-specific factors like whether the consumer takes a tax deduction for the number. *Chennette v. Porch.com*, 50 F.4th 1217, 1225 (9th Cir. 2022).

Here, Plaintiff offered no way to do any of that. She just claimed that her expert "could" (but hadn't yet) compare numbers to a database to remove numbers publicly associated with businesses. ECF No. 94 at 9. That's the same methodology (from the same expert firm, no less) that this Court rejected in *Davis*. *See* 2023 WL 6964051, at *8–11. The district court's order adopting that speculative methodology wholesale—which would only address a slice of one of five *Chennette* factors anyway—was clear error.

In sum, the certification order inverts the burden on predominance and ascertainability, accepting Plaintiff's speculation over Defendants' evidence, and making no actual evidentiary findings. This factor strongly favors granting review.

[6] *See, e.g.*, Dkt. 115-9, 115-17, 115-20 (consumer declarations identifying mixed-use or business-use of their telephone numbers); Dkt. 115-13, Sarfati Decl., ¶¶ 19–29 (Liberty sales representative declarations identifying same).

III. The Petition Presents Unsettled and Important Questions the Fourth Circuit Has Not Resolved.

The Fourth Circuit has not previously addressed several issues raised here:

- **How *TransUnion* applies where many absent members requested and wanted the communications at issue and themselves say they were not harmed.** This issue is recurring nationwide and outcome-determinative.

- **Whether a plaintiff with no arbitration agreement, no EBR, and no consent can represent class members who have all three.** With "wrong number" TCPA class actions flooding the courts—indeed, a single plaintiff has filed 75 "wrong number" class actions this year[7]—this question is of vital importance.

- **Whether defendants can forfeit an arbitration or class-waiver defense as to absent class members before certification.** *Maldini* touches on this issue but does not directly answer it.

- **Whether classes are ascertainable where evidence shows that many prerequisites to class membership are individualized.** This requires appellate guidance, particularly after *Davis*.

- **How Rule 23's "rigorous analysis" requirement applies when a district court adopts plaintiff's brief verbatim, refuses to consider defense evidence, and applies high-level generalizations and speculation about the "uniformity" of processes.**

These are important, recurring questions that will continue to evade review if the Fourth Circuit does not intervene. This factor strongly supports granting the petition.

[7] *See* Law360, Search Results for "Chet Wilson TCPA" – Cases, https://www.law360.com/search/cases?facet=&page=1&per_page=20&q=chet+wilson+tcpa (last visited Dec. 17, 2025).

CONCLUSION

The *Lienhart* factors overwhelmingly favor review. This Court should grant permission to appeal, reverse the certification order, and direct the district court to deny class certification.

Submitted this 17th day of December, 2025, by:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. _____ **Caption:** Diana Mey v. Liberty Home Guard, LLC et al.

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