CONAGRA BRANDS, INC., v. ROBERT BRISE[#x00D1]O, ET AL., Petitioner, Respondents.

No. 16-1221

SUPREME COURT OF THE UNITED STATES

2016 U.S. Briefs 1221; 2017 U.S. S. Ct. Briefs LEXIS 1333

April 10, 2017

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit.

Petition for Writ of Certiorari

COUNSEL: [**1] ANGELA M. SPIVEY, MCGUIREWOODS LLP, Atlanta, GA, R. TRENT TAYLOR, MCGUIREWOODS LLP, Richmond, VA, SHAY DVORETZKY, Counsel of Record, JEFFREY R. JOHNSON, JONES DAY, Washington, DC, Counsel for Petitioner.

STATUTES INVOLVED: CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Federal Rule of Civil Procedure 23, the relevant portions of which are reproduced at Pet.App.353a-355a.

TITLE: PETITION FOR A WRIT OF CERTIORARI

[*i] **QUESTION PRESENTED**

Petitioner Conagra makes Wesson brand cooking oil. Respondents sought to represent classes of all those who had purchased Wesson Oil in eleven states during the past ten years. But Respondents never proposed any way to efficiently [**7] and reliably identify the likely millions of people who fall within that class definition--and there isn't one. Conagra does not sell directly to consumers, so it has no records of any individual purchases. Similarly, Respondents never sought records from other businesses such as grocery stores, likely because they don't have them either. And even if consumers could accurately recall small purchases made years ago, it would take myriad mini-trials to prove as much. With full knowledge of these difficulties, the Ninth Circuit nonetheless affirmed class certification.

The question presented is whether Federal Rule of Civil Procedure 23 permits a district court to certify a damages class where there is no reliable, administratively feasible method for identifying the members of the class.

[*ii] **PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT**

Petitioner Conagra Brands, Inc., formerly known as ConAgra Foods, Inc., changed its corporate name effective November 9, 2016. ConAgra Foods, Inc., was Appellant below. Conagra Brands, Inc., has no parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

Respondent Robert Brise[#x00F1]o, who was [**8] Appellee below, sued Conagra on behalf of himself and a putative class in the Central District of California. Several other cases were consolidated with Mr. Brise[#x00F1]o's. The District Court certified eleven classes, with Mr. Brise[#x00F1]o and others--Respondents Michele Andrade, Jill Crouch, Erika Heins, Dee Hopper-Kercheval, Rona Johnston, Kelly McFadden, Pauline Michael, Necla Musat, Julie Palmer, Cheri Shafstall, Maureen Towey, and Anita Willman--as class representatives.

INTRODUCTION

Courts across the country regularly face putative class actions in which the class members are nearly impossible to identify. Consider a class of everyone who purchased a particular kind of bottled water in the past ten years. The class definition is straightforward: if you bought that kind, you're in; if you didn't, you're out. But figuring out who the class members actually are requires herculean effort, if it can be done at all. The manufacturer likely sells through distributors and retailers, not directly to consumers, so it has no idea who bought its products. Distributors are in a similar boat, and retailers--the only ones who interact with individual purchasers--generally don't [**9] keep records of those purchases, especially for such a long period.

Consumers themselves might be in the hardest spot of all. Few people save every receipt, and few can accurately recall such trivial purchases years later. Think of the questions. Was it Deer Park, or Dasani? Maybe Aquafina? The store brand? Did I buy eight-ounce minis or the regular twenty-ounce bottles? Was it a twelve pack or a twenty-four pack? And was it really ten years ago, or eleven?

Courts disagree on the obvious question raised by such classes: may a court certify them without a reliable method for identifying class members, short of myriad mini-trials? The Second, Third, Fourth, and Eleventh Circuits have said no, and courts applying that approach have refused to certify classes of consumers. who bought diet pills, eggs, sneakers, and tires. The Sixth, Seventh, and Ninth Circuits have said yes, and courts applying that approach have certified indistinguishable classes [*2] involving nutritional supplements, beauty products, single-serve coffee, and ramen noodles.

This disagreement is intolerable. Class certification is the most important decision in any class action, and now it turns on venue in many, [**10] many cases. This case--involving those who bought "100% Natural" Wesson Oil in eleven states over the past decade or so--provides this Court with the perfect opportunity to finally end the dispute over this fundamental question of class-action law.

OPINIONS BELOW

The Ninth Circuit's opinion rejecting Conagra's claim that the classes had to be ascertainable (Pet.App.la-33a) is published at *844 F.3d 1121 (9th Cir. 2017).* Its opinion rejecting Conagra's other challenges to class certification (Pet.App.34a-39a) is unpublished but reported at *F. App'x , 2017 WL 53421* (9th Cir. Jan. 3, 2017). Its order denying rehearing en banc (Pet.App.349a-350a) is unpublished and unreported.

The District Court's decision granting class certification (Pet.App.40a-254a) is published at *90 F. Supp. 3d 919 (C.D. Cal. 2015).* Its earlier decision denying class certification without prejudice (Pet.App.255a-348a) is unpublished and unreported.

JURISDICTION

The Ninth Circuit entered judgment on January 3, 2017. Pet.App. la. It denied rehearing en banc on February 14, 2017. Pet.App.349a-350a. This Court has jurisdiction under *28 U.S.C. § 1254(1)* [**11] .

[*3] **STATEMENT**

1. Conagra sells cooking oil--vegetable, canola, a blend of those two, and corn--under the Wesson brand. Since the mid-1980s, Wesson Oil has used terms like "Natural," "Pure," and "100% Natural" on its labels. ER773.

"Natural" conveys different things to different people. The FDA has not "defin[ed] the term and has "not objected" to it "if the food does not contain added color, artificial flavors, or synthetic substances." FDA, *What Is the Meaning of "Natural" on the Label of Food*?, goo.gl/JZxtxX (last updated Jan. 5, 2017). When hundreds of consumers were asked what the term "100% Natural" meant on a bottle of vegetable oil, their responses varied widely. Roughly 40% said they did not know or were not sure what it meant. ER887. Those who tried to define the term gave answers all over the map. Some said it meant "no artificial ingredients," some "healthy," others "no mineral oil," and still others "no G[enetically] M[odified] O[rganisms]." ER803. One even said it meant "nothing," because "there is no government rating that is '100% Natural.'" ER803.

The various kinds of Wesson Oil share shelf space with both store-brand (or "private-label") [**12] competitors and brand-name competitors such as Crisco, Mazola, and LouAna. ER773-74. These products often have similar labels. Until recently, [*4] Crisco labeled its cooking oil "Pure" and "All Natural." ER774. LouAna calls its cooking oils "Pure" and "All Natural," while Mazola calls its "100% Pure." ER773-74. Some private-label products also use "pure" and "natural." ER774. Thus, when a shopper purchases a bottle of cooking oil, he chooses from a number of similar items sold by different companies, many of whose products are "pure" or "natural."

2. In June 2011, Robert Brise[#x00F1]o sued Conagra. He alleged that it marketed Wesson Oil as "100% Natural" even though its oils were derived from GMOs. According to Brise[#x00F1]o, doing so allowed Conagra to recoup an unlawful price premium on its sales--the difference between the sales price and what "truly" "100% Natural" oil would cost. Pet.App.23a-24a.

The United States District Court for the Central District of California consolidated a number of related lawsuits with Mr. Brise[#x00F1]o's, and Plaintiffs moved to certify several classes of purchasers of Wesson Oil. Pet.App.3a. Each putative class included claims governed [**13] by a different state's law. Pet.App.5a. The start date for each proposed class varied with each state's statute of limitations (with the earliest beginning in January 2007), and each ran through the end of the litigation. Pet.App.5a; Pet.App.43a-44a.

a. Citing *Carrera U. Bayer Corp., 727 F.3d 300 (3d Cir. 2013)* and other cases, Conagra argued that Plaintiffs' proposed classes were not ascertainable--that is, they could not be certified because Plaintiffs had not proposed (and could not propose) any reliable, feasible method for identifying those who [*5] had purchased Wesson Oil within the relevant timeframe. ER733-34.

Plaintiffs argued that whether they could put forward such a method was "irrelevant" to class certification. ER300. Plaintiffs admitted that *Carrera* held otherwise, but argued that *Carrera* was wrongly decided. ER301; *see also* ER5618 (noting "conflicting case law"); ER6293 (criticizing *Carrera*). On their view, a proposed class is ascertainable so long as it is defined "by reference to objective criteria," regardless of how hard it would be to determine who meets those criteria. ER300.

b. This dispute mattered because of [**14] the difficulty of identifying those who purchased Wesson Oil in eleven states over the past decade. Conagra itself had no records identifying these purchasers because it does not sell directly to consumers. ER774. Other businesses similarly lacked (and Plaintiffs never asked them to provide) such information. Conagra's data vendor, for example, provides only aggregate data 'about sales, and even then only extrapolates from sampling. ER775.

That left only one other possible source of information about the transactions--consumers' memories of low-value grocery store purchases, recalled years later in hopes of a cash reward. Plaintiffs themselves recognized the problems with identifying class members this way. They objected to questions about alleged purchases (how many made, their dates and locations, the types and amounts of oil purchased, the prices paid, any discounts received, and so on) because they could not be expected "to recall every purchase of Wesson cooking oil" from so long ago. ER1510-15. Nor could they be [*6] expected to have "detailed recollections" or "record[s]" of those purchases. ER1510-16; *see also* ER1515-21 (objecting to similar questions about purchases [**15] of non-Wesson products).

Plaintiffs' own testimony further illustrated how hard it is to recall such trivial purchases years down the road. One testified that she "d[idn't know]" the number of bottles of oil she had purchased since June 2007, ultimately settling on "between five and ten" as a "good guess." ER1345. She further "guess[ed]" that she purchased those bottles "possibly [at] Safeway, possibly [at] Albertson's, and definitely [at] King Soopers." ER1345. While she had "no idea" how much she had spent on Wesson Oil overall, she "just guess[ed]" that she had paid around one to five dollars per bottle. ER1346. She admitted, however, that the prices she paid "probably" varied and that she "[p]ossibly" used a coupon or a store discount card sometimes. ER1345-46. She also testified that she "probably purchased" store-brand oils "[m]aybe once a year" during the same timeframe--it "could have been [canola], and possibly corn or vegetable"--and it was "[p]ossibl[e]" that she had purchased other name-brand oil as well. ER1347-48.

Other plaintiffs had similar difficulties. One originally testified that she had not purchased any Wesson Oil since June 2007, a date [**16] that would have kicked her out of the relevant class. Pet.App.299a n.95. She later declared, however, that she had been mistaken: she now recalled that a car accident had prompted her to reduce the oil in her diet, and that accident took place in September 2008, so her last purchase "must have occurred" within the [*7] limitations period, her prior recollection notwithstanding. ER6355; *see also* ER1588-89 (one plaintiff purchased corn oil "1-2 times per year," from "[v]arious Marsh Supermarkets locations in Indianapolis," for "[a]pprox. the average retail price for the area"); ER1599-1602 (another purchased vegetable oil "approximately once a year" since 2007, for a total of "approximately four to seven bottles," and "typically" paid the "average retail price" in her area).

c. The district court certified Plaintiffs' proposed classes. Pet.App.253a-254a. It recognized that district courts in the Ninth Circuit were "split as to whether the inability to identify the specific members of a putative class ... makes the class unascertainable," Pet.App.110a, with some courts following *Carrera* and others criticizing it. The district court "agree[d]," however, "with those [**17] courts that have found classes, such as those proposed by plaintiffs, ascertainable." Pet.App.112a. Otherwise, "class actions involving low priced consumer goods" would be "effectively prohibit[ed]." Pet.App.112a. n1

> n1 The district court had previously denied class certification for other reasons. Pet.App.255a-348a. With respect to ascertainability, the court's order granting certification largely tracked its prior one. Pet.App.303a-310a.

3. The Ninth Circuit affirmed. Pet.App.1a-33a (opinion addressing ascertainability); Pet.App.34a-39a (opinion addressing other criteria). The panel acknowledged that the district court had not required Plaintiffs "to proffer" an efficient, reliable means of identifying class members. Pet.App.3a. It [*8] also took no issue with Conagra's claim that there was no such method because "consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil." Pet.App.7a. And it realized that, [**18] "in similar circumstances," "the Third Circuit" and other courts "have refused certification." Pet.App.6a; Pet.App.11 a ("[T]he Third Circuit does require putative class representatives to demonstrate 'administrative feasibility' as a prerequisite to class certification.").

It held, however, that "demonstrating an administratively feasible way to identify class members" is not "a prerequisite to class certification." Pet.App.24a. n2 It first reasoned that Rule 23 contains no such express requirement.

Federal Rule of Civil Procedure 23(a) sets forth four requirements for class certification, none of which "mention 'administrative feasibility.'" Pet.App.9a. Because the Rule "specifically enumerate[s]" those prerequisites, Pet.App.9a, the court concluded it could not "interpose an additional hurdle into the class certification process," Pet.App.10a.

n2 The Ninth Circuit declined to use the term "ascertainability" because courts have sometimes used it in different ways. Pet.App.5a n.3. Unless otherwise noted, we use it here to refer specifically to the requirement that would-be class plaintiffs proffer an efficient, trustworthy means of identifying class members.

[**19]

The panel then devoted most of its opinion to criticizing the Third Circuit's reasoning. Pet.App.11a-25a. It thought, for instance, that other class-certification requirements could better address [*9] concerns about manageability. Pet.App.13a-15a. It also reasoned that concerns about absent class members were misplaced: due process does not demand actual notice, and few absent class members are likely to opt out to pursue their own low-value claims anyway. Pet.App.15a-18a.

The panel was similarly unmoved by fears of fraud. Given the low stakes, it believed few would go to the trouble of submitting bogus claims that might take funds away from those actually harmed. Pet.App.18a-19a. The panel likewise discounted worries about the defendant's ability to press its case because defendants could still challenge individual claims on the back end. Pet.App.19a-23a. Moreover, per the panel, the defendant has no right to present such defenses where the plaintiffs plan to establish the defendant's liability in aggregate rather than individually. In such cases, individualized defenses do not affect the size of the check the defendant must write, only whether its proceeds go to one (potentially [**20] mistaken) claimant, another (potentially mistaken) claimant, or a *cy pres* recipient. Pet.App.23a-24a. n3

n3 In a separate unpublished opinion, the Ninth Circuit rejected Conagra's other arguments against class certification. Pet.App.34a-39a.

The Ninth Circuit denied rehearing en banc on February 14, 2017. Pet.App.349a-350a. It granted Conagra's motion to stay the mandate, which was premised on the likelihood that this Court would grant certiorari to resolve the split. Pet.App.351a-352a.

[*10] **REASONS FOR GRANTING THE WRIT**

I. THE CIRCUITS ARE DIVIDED.

Would-be class plaintiffs in the Second, Third, Fourth, and Eleventh Circuits must provide an efficient method for identifying absent class members; would-be class plaintiffs in the Sixth, Seventh, and Ninth Circuits need not. Class certification--"often the most significant decision rendered in ... class-action proceedings," *Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980)*--should not differ by venue. This [**21] Court should resolve this important circuit split.

A. Several Circuits Require Plaintiffs To Provide a Reliable, Efficient Method for Identifying Class Members

1. In the Third Circuit, "[c]lass ascertainability is 'an essential prerequisite of a class action.'" *Carrera, 727 F.3d at 306* (quoting *Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592-93 (3d Cir. 2012))*. To be ascertainable, a class must meet "two important elements": the class must be "defined with reference to objective criteria," *and* there must be "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class

definition." *Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013); see, e.g., Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015)* (same).

These two related questions must be "rigorous[ly]" examined "at the outset" because of the "key roles [they] play[] as part of a Rule 23(b)(3) class action." *Carrera, 727 F.3d at 307.* Each "eliminates serious administrative burdens that are incongruous [*11] with the efficiencies expected in a class action. [**22] " *Id.* They also facilitate notice, guard absent class members against fraud, and protect the defendant's right to challenge every claimant's class membership. *Id. at 307, 310; see Marcus, 687 F.3d at 593.*

The Third Circuit's ascertainability requirement has real teeth. Any proposed method of identification must provide more than just "the say-so of putative class members." *Hayes, 725 F.3d at 356; see also Marcus, 687 F.3d at 594.* And any proposed method must not require "extensive and individualized fact-finding." *Hayes, 725 F.3d at 356.* Unless would-be plaintiffs can point to reliable records or an effective method for screening (and adversarially testing) individual affidavits, they cannot proceed as a class. *See, e.g., Carrera, 727 F.3d at 308-12.*

Under these standards, the Third Circuit has rejected a number of class actions just like the one against Conagra. In *Carrera*, it set aside certification of a class of those who had purchased One-A-Day WeightSmart nutritional supplements sold at retail; the plaintiffs put forward "no evidence" that retailers had records for the [**23] relevant period, nor had they proposed a method for screening affidavits that was "specific to th[e] case" and "reliable." *Id. at 309, 311.* In *Hayes*, it vacated a class of those who purchased warranties on certain items at Sam's Club because the company's records could not be used to identify the relevant purchases, and the plaintiff offered only other class members' "say-so" as an alternative method. *725 F.3d at 355-56.* And in *Marcus*, it vacated a class of those who purchased or [*12] leased cars with run-flat tires and then had those tires replaced after going flat. Dealership records did not identify which cars came to the lot with run-flat tires, which cars left the lot with those tires, or which tires were replaced at third-party repair shops. *687 F.3d at 593-94.*

Even when certifying classes, the Third Circuit has reiterated its ascertainability requirement (and found it satisfied). In *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation, 795 F.3d 380 (3d Cir. 2015),* it acknowledged that certification is improper where "class members are impossible to identify" without mini-trials. [**24] *Id. at 396.* There, the defendant bank's records *identified* those with the mortgages in question, and the defendant's speculative concern--that some mortgagees might not be the real party in interest because of bankruptcy--could be addressed by consulting a few records. *Id. at 397.* So too for *Byrd*. Those who had purchased or leased spyware-equipped computers could readily be identified through the defendant's own records, and their household members could be identified through public records, supplemented by verifiable testimony if necessary. *See 784 F.3d at 169-71.*

2. The Fourth Circuit has also "repeatedly recognized" an ascertainability requirement: as an "implicit threshold requirement" that must be met prior to certification, a plaintiff must demonstrate that "the members of [the] proposed class [are] readily identifiable." *EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014).* In *EQT*, the district court certified classes of those who owned interests in coalbed methane gas and had allegedly not [*13] received the requisite royalties. Identifying the owners of those interests, however, [**25] was easier said than done; though records prepared years before offered a starting point, "numerous heirship, intestacy, and title-defect issues" still "plague[d]" the process of locating them. *Id. at 359.*

The Fourth Circuit vacated class certification. In its view, if class members cannot be "identif[ied] without extensive and individualized fact-finding ... , then a class action is inappropriate.'" *Id.* (quoting *Marcus, 687 F.3d at 593).* Because the court had not fully appreciated the task ahead of it--it considered neither the "number" of difficult-to-identify owners nor any "trial management tools ... available to ease th[e] process" of identifying them--the Fourth Circuit remanded for a proper ascertainability analysis prior to certification. *Id.* at 360. n4

n4 The Ninth Circuit thought it "far from clear" that the Fourth Circuit had adopted an ascertainability requirement because the problems it identified "sounded in definitional deficiencies, numerosity questions, predominance problems, and management difficulties." Pet.App.11a n.6. This reasoning is ironic, given that the panel criticized the ascertainability requirement for overlapping with other certification factors. Pet.App.13a. It is also wrong. *EQT* called ascertainability an "implicit threshold requirement," followed the Third Circuit's opinion in *Marcus*, and instructed the district court to assess ' "ascertainability" on remand. *764 F.3d at 358, 360.*

[**26]

3. The Second Circuit has also recognized an "implied requirement of ascertainability," according to which a class may not be certified unless it is "defined by objective criteria that are administratively feasible" *and* that allow for the "identif[ication] of [class] members" without [*14] intensive fact-finding. *Brecher v. Republic of Argentina, 806 F.3d 22, 25 (2d Cir. 2015). Brecher* vacated the grant of class certification in part because, even if the holders of beneficial interests in the bonds at issue "could be traced," "determining class membership would require the kind of individualized mini-hearings that run contrary to the principle of ascertainability." *Id. at 26.* n5

n5 The Ninth Circuit recognized that *Brecher* "mentioned administrative feasibility and cited *Marcus*," but claimed "administrative feasibility played no role in the court's decision, which instead turned on the principle that a class definition must be objective and definite." Pet.App.11a n.6. Again, not true. The panel rejected certification "*[e]ven if*" the various interest holders "could be traced"--that is, even if all those who fell within the objective class definition (those who held beneficial interests) could be definitively identified--because doing so would require "individualized mini-hearings." *806 F.3d at 26* (emphasis added).

[**27]

The Second Circuit recently applied *Brecher* to affirm the denial of class certification for a putative class composed of those who received prerecorded calls from the defendant on their residential phone line. *See Leyse v. Lifetime Entm't. Servs., LLC, F. App'x , 2017 WL 659894* (2d Cir. Feb. 15, 2017). "Our precedent," the Second Circuit explained, prohibits class certification where "identifying [class] members would ... require a mini-hearing on the merits of each case." *Id.* at *2 (quoting *Brecher, 806 F.3d at 24-25).* Because no list of called numbers "existed," "no such list was likely to emerge," and "proposed class members could not realistically be expected to recall a brief phone call received six years ago" or to "retain any concrete documentation" [*15] of such a call, the court affirmed the district court's "finding that Leyse had failed to show a sufficiently reliable method for identifying the proposed class" without "mini-hearing[s]." *Id.* (internal quotation marks omitted, alteration in original).

4. Finally, the Eleventh Circuit has held that "*[b]efore* a district court may grant a motion [**28] for class certification," the plaintiff "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). In *Karhu v. Vital Pharmaceuticals, Inc., 621 F. App'x 945 (11th Cir. 2015),* this requirement doomed a proposed class of those who had purchased the defendant's aggressively named VPX Meltdown Fat Incinerator. VPX's sales data "identified mostly third-party retailers, not class members," and the plaintiff had not demonstrated that third-party subpoenas to those retailers could bridge the gap, nor had he explained how affidavits could be used without generating myriad mini-trials. *See id. at 949-50; see also Ward v. EZCorp, Inc., F. App'x , 2017 WL 908194* (11th Cir. Mar. 8, 2017) (per curiam) (affirming denial because the plaintiff proposed no method that could identify pawn shop customers wrongly charged a particular fee); *Bussey v. Macon Cty. Greyhound Park, Inc., 562 F. App'x 782, 788 (11th Cir. 2014)* (per curiam) (vacating where plaintiffs had not "provided any [**29] indication" they could identify class members using records or another reliable method).

[*16] **B. Other Circuits Do Not Require Plaintiffs To Provide a Reliable, Efficient Method for Identifying**

Class Members

Other circuits allow class actions to proceed even though the plaintiffs have not proposed (and likely cannot propose) a reliable means of identifying class members. Each of these circuits has recognized its disagreement with (at least) the Third Circuit.

1. In *Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. 2015),* the district court certified classes of those who had purchased Instaflex Joint Support, a supplement that plaintiffs alleged was snake oil. Relying on Third Circuit precedent, Direct Digital asked the Seventh Circuit to decertify because it "ha[d] no records for a large number of retail customers," most consumers likely had not "kept their receipts," and there was no effective means of screening self-serving affidavits. *Id. at 661.*

The Seventh Circuit "decline[d]" to follow the Third Circuit's approach. *Id. at 662.* It accepted as "well-settled" the requirement that a class be "defined clearly [**30] and based on objective criteria." *Id. at 659.* It refused, however, to require plaintiffs to provide "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id. at 662* (quoting *Byrd, 784 F.3d at 163).* The court recognized the "substantial and legitimate" concerns underlying the Third Circuit's approach, *id.* at 663, but concluded that they were "better addressed" through other class-certification requirements, which "balance [the] interests that Rule 23 is designed to protect." *Id.* at 658, 672. The Third Circuit's approach, according to *Mullins*, "upsets this balance" [*17] and might prevent low-value consumer class actions from ever being certified. *See id.* at 658, 664-68.

2. In *Rikos v. Procter & Gamble Co., 799 F.3d 497 (6th Cir. 2015),* the district court certified classes of those who had purchased Align, a probiotic nutritional supplement that plaintiffs alleged did not in fact aid digestion. On appeal, Procter & Gamble argued that the class was not ascertainable because most consumers bought Align from retailers, [**31] so there was "no plausible way to verify that any one single individual actually purchased Align." *Id. at 524-25.*

The Sixth Circuit, however, "s[aw] no reason to follow *Carrera*" and its demand for a reliable, efficient means of identifying class members. *Id. at 525; see id.* (noting that courts had criticized *Carrera,* including the Seventh Circuit in *Mullins* and the district court in Conagra's case). Like the Seventh Circuit, it worried that an ascertainability requirement would eliminate class actions for many low-value consumer goods. *See id.* Thus, even though identifying Align purchasers might "require substantial review," the court upheld class certification because the class was "defined by objective criteria." *Id. at 526.*

3. The decision below adopted the approach of the Sixth and Seventh Circuits and rejected the Third's. Pet.App.4a. The panel acknowledged that the district court had not required Plaintiffs to "proffer a reliable way to identify members of the certified classes." Pet.App.3a. It also did not dispute Conagra's basic claim that, given the absence of records and the perils of memory, "consumers [**32] would not be able to reliably identify themselves as class members." Pet.App.5a; Pet.App.7a (noting Conagra's [*18] argument that "consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil").

Nonetheless, the Ninth Circuit upheld class certification because it "decline[d]" to require a mechanism for identifying absent class members. Pet.App.4a. It accepted that classes "must not be vaguely defined and must be sufficiently definite," Pet.App.7a n.4, but it rejected an ascertainability requirement as inconsistent with Rule 23's text and unnecessary to guard absent class members, prevent fraud, or protect defendants' rights. Pet.App.8a-24a. It, too, feared that an ascertainability requirement would shut the courthouse doors to consumer class actions. Pet.App.17a.

4. The Ninth Circuit claimed that the Eighth Circuit has also taken its position, Pet.App.4a, but *Sandusky Wellness Center v. MedTox Scientific, Inc., 821 F.3d 992, 995 (8th Cir. 2016)* only illustrates the confusion caused by the "diverge[nce]" among the circuits "on the meaning of ascertainability." On the [**33] one hand, the Eighth Circuit suggested agreement with the Ninth Circuit (and others) by stating that it has "not outlined a requirement of ascertainability" as a "separate, preliminary requirement." *Id. at 996.* On the other, it suggested agreement with the

Third Circuit (and others) by reading Rule 23 to require that the class be "adequately defined and clearly ascertainable." *Id. at 996.* It also upheld the class in question because "fax logs showing the numbers that received each [disputed] fax [we]re objective criteria that make the recipient clearly ascertainable." *Id. at* [*19] *997.* This focus on records makes little sense under the Ninth Circuit's approach.

District courts in the Eighth Circuit have drawn contradictory conclusions from this jumble. *Compare Abarca v. Werner Enters., Inc., 2016 WL 6407836* (D. Neb. Oct. 28, 2016) (denying certification of a class of truckers who worked in California on ascertainability grounds), *with In re Global Tel*Link Corp. ICS Litig., 2017 WL 471571,* at *3 (W.D. Ark. Feb. 3, 2017) (certifying a class of hard-to-identify prisoners who paid to make phone [**34] calls because it does not matter "how administratively difficult it may be to locate ... class members in practice"). And relief, alas, is not in sight; *McKeage v. TMBC, LLC, 847 F.3d 992, 998-99 (8th Cir. 2017)* (per curiam), recently reiterated *Sandusky*'s mess.

II. THE CIRCUIT SPLIT IS IMPORTANT BECAUSE CRITICAL CERTIFICATION DECISIONS NOW TURN ON VENUE.

Again, class certification is "often the most significant decision rendered in ... class-action proceedings." *Roper, 445 U.S. at 339.* It should not depend on whether customers shopped at a Safeway in California or a Kroger in Pennsylvania.

A. Class Certification Matters

This Court has repeatedly recognized the game-changing significance of certification decisions. "Certification ... may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978).* Worse, defendants often have to abandon cases that are [*20] *clear winners.* "[W]hen damages allegedly owed to thousands of potential claimants [**35] are aggregated and decided at once, the risk of error will often become unacceptable." *AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011).* "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.*

The plaintiffs' bar understands these coercive forces. After certification, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740 (1975).* In other words, the post-certification value of plaintiffs' claims "reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone / Firestone, Inc., 288 F.3d 1012, 1016 (7th Cir. 2002)* (Easterbrook, J.). "Judge Friendly, who was not given to hyperbole," called the deals struck in such circumstances '"blackmail settlements.'" *In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995)* (Posner, J.) (quoting Henry J. Friendly, *Federal Jurisdiction:* [**36] *A General View* 120 (1970)).

B. Ascertainability Now Leads to Different Results in Indistinguishable Cases

1. Circuits courts recognize that their divergence affects many certification decisions. *Mullins* explained, for example, that other courts' "heightened" ascertainability requirement "has defeated certification, especially in consumer class actions," *795 F.3d at 657,* while the Ninth Circuit made a similar point below, Pet.App.6a. Commentators have also noted the often dispositive [*21] disagreement. *See, e.g.,* 1 MCLAUGHLIN ON CLASS ACTIONS § 4:2 (13th ed. 2016 update) (noting that the Sixth and Seventh Circuits "have rejected" the Third Circuit's approach); 7A FEDERAL PRACTICE & PROCEDURE § 1760 (3d ed. Jan. 2017) (noting that the Seventh Circuit has "specifically rejected" the Third Circuit's approach).

2. Recent litigation makes clear that certification turns on geography. Courts that require plaintiffs to propose a reliable, feasible method of identification have routinely denied class certification in consumer class actions. In *Ault v.*

J.M. Smucker Co., 310 F.R.D. 59, 64-66 (S.D.N.Y. 2015), for example, the court declined [**37] to certify classes of those who bought Crisco cooking oil labeled "All Natural." In *In re Processed Egg Products Antitrust Litigation, 312 F.R.D. 124 (E.D. Pa. 2015),* the court refused to certify classes of those who had purchased eggs at grocery stores despite its "qualms" about the effects of a "heightened ascertainability requirement" on consumer classes; as it explained, such consumers rarely have receipts and may not accurately recall purchases, and the plaintiffs had not suggested a method for screening affidavits. *See id. at 138-41, 141 n.13.* Classes of those who purchased over-the-counter products marketed as "The Better Vitamin C" met the same fate, *see Hughes v. The Ester C Co., 317 F.R.D. 333, 348-50 (E.D.N.Y. 2016),* as did classes of those who bought SpringBlade sneakers, *Ruffo v. Adidas Am. Inc., 2016 WL 4581344,* at *2 (S.D.N.Y. Sept. 2, 2016), and Rock 'N Play infant sleepers, *see Harris v. Fisher-Price,* [*22] *Inc., 2016 WL 1319696,* at *1-2 (N.D. Ala. Apr. 5, 2016). The list goes on. n6

n6 *See, e.g., Wilmington Sav. Fund Soc'y, FSB v. Bus. Law Grp., P.A., F.R.D. , 2017 WL 1034198,* at *7 (M.D. Fla. Feb. 22, 2017) (mortgagees whose class membership could only be determined by "individual inquiry into the circumstances surrounding each potential class member's" mortgage); *Abraham v. WPX Prod. Prods., LLC, 317 F.R.D. 169, 254-58 (D.N.M. 2016)* (well owners whose gas was processed at certain facilities); *Shepherd v. Vintage Pharms., LLC, 310 F.R.D. 691, 696-97 (N.D. Ga. 2015)* (women who purchased or ingested birth control pills with a rare, apparently random packaging defect); *McCamis v. Servis One, Inc., 2017 WL 589251,* at *3 (M.D. Fla. Feb. 14, 2017) (former homeowners contacted by a mortgage servicer after obtaining discharges in bankruptcy); *Peterson v. Aaron's, Inc., 2017 WL 364094,* at *3-5 (N.D. Ga. Jan. 25, 2017) (users, owners, and lessees of computer equipment); *Kotsur v. Goodman Global, Inc., 2016 WL 4430609,* at *5-6 (E.D. Pa. Aug. 22, 2016) (homeowners who paid to replace an HVAC unit's evaporator coil while still under warranty); *Brown v. Sega Amusements, U.S.A., Inc., 2015 WL 9450812,* at *1, *3 (S.D.N.Y. Nov. 30, 2015) (those who "played the Sega Key Master arcade game" but received no "prize").

[**38]

By contrast, classes like these sail through in jurisdictions where courts ask only for an objectively defined class. In *Suchanek v. Sturm Foods, Inc., 311 F.R.D. 239 (S.D. Ill. 2015),* for example, the court certified classes of those who had purchased Grove Square Coffee single-serve coffee cups (marketed as "premium," but allegedly 95% instant coffee) because the plaintiffs did not need to explain how these "in-store purchasers" could possibly be identified. *Id. at 243, 260.* Another court expressly relied on the decision below to certify classes of those who purchased Korean ramen in 23 states and the District of Columbia--much to the relief of college [*23] alums nationwide. *See In re Korean Ramen Antitrust Litig., 2017 WL 235052,* at *21, *24 (N.D. Cal. Jan. 19, 2017). This list, too, goes on. n7

n7 *See, e.g., Meyer v. Bebe Stores, Inc., 2017 WL 558017,* at *3 (N.D. Cal. Feb. 10, 2017) (those who received text messages from a retailer even though the third-party messenger may not have had records of the numbers texted); *Mojica v. Securus Techs., Inc., 2017 WL 470910,* at *4 (W.D. Ark. Feb. 3, 2017) (those who paid to make or receive calls from correctional facilities, even though defendant did not directly receive the payments); *Hale v. State Farm Mut. Auto. Ins. Co., 2016 WL 4992504,* at *10-11 (S.D. Ill. Sept. 16, 2016) (automobile insurance policyholders who "received quotes for non-OEM crash parts" or "had those parts installed"); *Steigerwald v. BHH, LLC, 2016 WL 695424,* at *4 (N.D. Ohio Feb. 22, 2016) (those who purchased inexpensive pest-control devices from retailers).

[**39]

III. THIS CASE IS AN EXCELLENT VEHICLE

A. Plaintiffs Did Not and Could Not Propose a Feasible Method for Identifying Class Members

1. The classes here could not have been certified if Plaintiffs had been required to put forward an efficient, reliable method for identifying those who purchased Wesson Oil at retailers in eleven states over the past decade. The district court recognized as much. It said Plaintiffs lacked the "[]ability to identify the specific members of [their] putative class[es]." Pet.App.110a. But because it "agree [d] with those courts that have found [such] classes ... ascertainable" so long as they are objectively defined, it certified anyway. Pet.App.112a.

The Ninth Circuit also acknowledged that these classes could not have been certified if Plaintiffs had [*24] to propose an efficient process for locating class members. The panel never suggested that there might be such a method lurking somewhere. In fact, it barely mentioned the facts of this case at all. Instead, it framed the question as a legal one: whether Plaintiffs must "proffer a reliable way to identify members of the certified classes." Pet. App.3a. It then upheld [**40] certification because it decided not to join the Third Circuit in requiring such a method. Pet.App.4a.

2. The lower courts had no choice but to resolve this case on the law: Plaintiffs did not propose a reliable and efficient means of identifying a decade's worth of Wesson Oil purchasers, and there isn't one. Conagra itself has no record of any individual purchase; it sells to distributors and retailers, not individual consumers. ER774. Plaintiffs never sought records from retailers (who likely do not track individual purchases over a decade). And the only other possible comprehensive source of such information--a third-party vendor that collects market-share data--doesn't have any either. It only collects data in aggregate, and even then only by sampling stores in particular regions. ER775.

Plaintiffs, for their part, did not put forward a method that could cure these defects, at least not one that went beyond "potential class members' say so." *Carrera, 727 F.3d at 304.* They argued that would-be class representatives need not proffer any feasible method of identification and, insofar as there were such a requirement, standalone affidavits could satisfy it because [**41] every bottle of Wesson Oil sold during the class period bore the "100% Natural" label. C.A. Br. 11-20. Plaintiffs recognized, however, [*25] that these arguments conflicted with the Third Circuit's more demanding approach. C.A. Br. 21-31.

Everyone involved in this case--the Ninth Circuit, the district court, Conagra, and Plaintiffs themselves--understood that these classes could not be certified if the Ninth Circuit took the Third Circuit's side of the pre-existing split. There could not be a cleaner vehicle for resolving that split.

B. This Case Differs from Previously Denied Petitions

1. In two cases a month apart in early 2016, this Court denied certiorari on the question presented. *See Procter & Gamble Co. v. Rikos, 136 S. Ct. 1493* (Mar. 28, 2016) (mem.); *Direct Digital, LLC v. Mullins, 136 S. Ct. 1161* (Feb. 29, 2016) (mem.). Unlike this case, those were flawed vehicles because in each there was reason to believe that most class members could easily be identified anyway.

Take first *Rikos*, where Procter & Gamble raised ascertainability as its third question presented. *See Petition, 2015 WL 9591989,* at i. After [**42] rejecting *Carrera*, the Sixth Circuit held that "[e]ven if [it] were to apply *Carrera*, there [we]re significant factual differences that ma[d]e [Rikos's] class more ascertainable" than the one in that case. *799 F.3d at 526.* Per the court, Procter & Gamble's "own documents indicate[d] that more than half of its sales" took place "online" and that, "[a]t a minimum, online sales would provide the names and shipping addresses of those who purchased Align." *Id.* "In addition," the court stated, studies conducted by Procter & Gamble "reveal[ed] that an overwhelming number of customers learned about Align through [*26] their physicians." *Id.* Thus, unlike the defendants in *Carrera*, Procter & Gamble "could verify that a customer purchased Align by, for instance, requesting a signed statement from that customer's physician," with "[s]tore receipts and affidavits ... supplement[ing]" these other methods. *Id. at 527.*

The respondent in *Rikos* pointed these problems out. *See BIO, 2016 WL 4176854,* at *32. Procter & Gamble disputed the accuracy of the Sixth Circuit's view of the facts. But it could not dispute [**43] that the Sixth Circuit had found those facts and had relied upon them in reaching its alternative holding. *See Reply, 2016 WL 1056624,* at *1142.

Mullins was also a problematic vehicle. In keeping with its name, Direct Digital was primarily a direct online retailer. It drummed up customers through television and online advertising and then, armed with the credit card and shipping information that customers themselves provided, sent a free bottle with 14 days' worth of product. *BIO, 2015 WL 9488470,* at *1-2. Unless customers canceled, however, Direct Digital then shipped them additional Instaflex each month, charging their already-provided credit cards. *Id.* at *2. Although Direct Digital sold some Instaflex through retailers, most of its revenue came through direct sales. *Id.*

Direct Digital quibbled with some of these facts; for example, it claimed that sales percentages did not tell the whole story because some customers buy more than others. *See Reply, 2016 WL 159561,* at *5. But it could not deny the respondent's fundamental points. It did not reject the respondent's description of its business model, and it merely "disputed" [**44] the claim that it "kn[ew] the identity of the [*27] overwhelming majority of its customers." *Id.* at *4. When push came to shove, the most it would say--in a footnote--was that it made "around half" of its sales at retail. *Id.* at *5 n.1. It is no surprise this Court denied certiorari when most class members could be identified after all.

2. The brief in opposition in *Mullins* also argued that there was no mature split because the Third Circuit had walked back its position since *Carrera. See 2015 WL 9488470,* at *18-21.

This was a bad argument the day it was made, and it has only gotten worse since. *Community Bank* and *Byrd*--the two cases that supposedly retreated from *Carrera*--reiterated its core holding: unless the plaintiff can provide "evidentiary support" for a method of identifying class members without resort to "extensive and individualized fact-finding," the class cannot be certified. *Community Bank, 795 F.3d at 396; see Byrd, 784 F.3d at 163-65.* The judges in those cases had no choice but to do so; the Third Circuit, over four judges' dissent, had already denied a request to revisit *Carrera* [**45] en banc. *See Carrera v. Bayer Corp., 2014 WL 3887938,* at *1 (3d Cir. May 2, 2014) (Ambro, J., dissenting sur denial of petition for rehearing en banc); *see also Byrd, 784 F.3d at 172, 177* (Rendell, J., concurring) (concurring under the Third Circuit's "current [ascertainability] jurisprudence" but calling for it to be jettisoned). *Carrera*'s core holding, however, is precisely the one with which the Sixth, Seventh, and Ninth Circuits disagree. *See supra* 16-19. Moreover, *Community Bank* and *Byrd* allowed certification only because class plaintiffs had proven an efficient, reliable means of identifying absent class members. *See* [*28] *supra* 12. Faithfully applying *Carrera* hardly cuts it back or eliminates the split.

Subsequent developments further demonstrate that, even if there were doubts about the scope or importance of the circuit split when *Rikos* and *Mullins* were denied, they are gone now. In case after case *since those decisions*, district courts that apply a more stringent approach to ascertainability have denied class certification because the plaintiffs had not proposed a reliable, feasible method for [**46] identifying absent class members. *See supra* 21-22 & n.6. But in case after case where courts do not impose such a requirement, virtually identical class actions have been certified. *See supra* 22-23 & n.7.

3. This has to stop. There is no question that class certification matters, that courts disagree about whether a class of impossible-to-identify plaintiffs can be certified, or that this disagreement leads to conflicting outcomes in indistinguishable cases. This case--the paradigmatic consumer class action at the heart of this disagreement--gives the Court an ideal vehicle through which to end the confusion.

IV. THE DECISION BELOW IS WRONG

A. Rule 23 Requires a Reliable, Feasible Method for Identifying Class Members

1. "The class action is 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 (2011)* (internal quotation marks omitted). For certain kinds of classes, that exception is justified. *See id. at 362* (discussing Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2)). Damages classes under Rule [*29] [**47] 23(b)(3), however, represent the "most adventuresome" departure from the usual rule. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997).* Like all class litigation, they

bind absent members to litigation in which they played no part. But unlike the limited-fund or injunctive classes addressed by Rules 23(b)(1) and 23(b)(2), they do so largely for "convenien[ce]" rather than necessity, *id. at 615*, all while greatly magnifying the defendant's potential liability, *see supra* 19-20.

To keep this "adventurous" departure within acceptable bounds, damages plaintiffs must propose an efficient, reliable means of identifying class members. Without such a mechanism, courts cannot meaningfully evaluate whether the proposed class satisfies Rule 23's other requirements. *See Byrd, 784 F.3d at 162.*

Without such a mechanism, courts also cannot meaningfully protect absent plaintiffs, class defendants, or their own dockets against the risks inherent in such cases. For plaintiffs, the difficulty of identifying absent class members makes it nearly impossible to provide notice, leaving them bound by litigation they might want to escape. *See* [**48] *Marcus, 687 F.3d at 593.* For defendants, that difficulty subjects their victories to potential collateral attack by unknown class members, *see Carrera, 727 F.3d at 310,* makes it hard to identify potentially applicable defenses against unknown class members, and jeopardizes their right to raise every available defense against every claim, *see id. at 307.* For courts, that difficulty threatens the very harm Rule 23 was designed to avoid. Cases will devolve into myriad mini-trials when defendants challenge [*30] individual claims by raising legitimate doubts about who *really* purchased everyday items many years ago. *See Marcus, 687 F.3d at 593.*

2. The Ninth Circuit largely brushed this all aside with a syllogism: none of the provisions in Rule 23 specifically requires a method for identifying absent class members, so under the interpretive principle *expressio unius est exclusio alterius*, there must not be any such requirement. Pet.App.8a-11a. That argument proves too much. Those courts that dispute the existence of an ascertainability requirement themselves recognize that a class must at least be "defined by [**49] objective criteria," *Rikos, 799 F.3d at 526,* not "vaguely defined," Pet.App.7a n.4; *see also Mullins, 795 F.3d at 657.* But that requirement--grounded in many of the same concerns as the ascertainability rule--is itself "implicit." *Mullins, 795 F.3d at 657.* Nothing in Rule 23 or the canons of interpretation precludes a court from recognizing an ascertainability rule grounded in "the nature of the class-action device itself." *Byrd, 784 F.3d at 162.*

The Ninth Circuit's syllogism also ignores the way in which an ascertainability requirement *derives from* Rule 23's prescribed demands. Among other things, those seeking to pursue damages claims as a class must prove that the representative parties' claims are "typical" of the class's as a whole, that the representative parties will "fairly and adequately protect" the class's interests, that there are "questions of law or fact common to the class," that those common questions will "predominate over" individualized ones, and that classwide adjudication "is superior to" other methods of resolving the [*31] dispute, considering "the likely difficulties in managing a [**50] class action." Fed. R. Civ. P. 23(a), 23(b)(3). Additionally, any class certification order "must define the class," Fed. R. Civ. P. 23(c)(1)(B), and upon certification the court must "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts," Fed. R. Civ. P. 23(c)(2)(B).

It is impossible to "rigorous[ly] analy[ze]" these requirements before certification, *Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013),* without determining whether class members can feasibly be identified. How could the court tell whether the common claims are typical or whether the named representative is truly representative when the members themselves cannot be identified? How could it reasonably notify millions of hard-to-identify class members? Most importantly, how could it conclude that classwide issues predominate or that classwide adjudication is superior when it knows that every single claimant may have to be cross-examined about whether he actually purchased an everyday item sometime in the past decade? Framed as an implicit requirement inherent in the class-action [**51] device or as an application of Rule 23's predominance and superiority requirements to a recurring set of facts, the ascertainability requirement fits comfortably within the text and purpose of that Rule.

[*32] **B. The Ninth Circuit's Approach Harms Class Members, Defendants, and District Courts Alike**

1. The Ninth Circuit also attacked the purposes underlying the ascertainability requirement, but those arguments

fare no better. It began by reasoning that administrative concerns about such classes were misplaced: courts possess "procedural tools" to manage these cumbersome cases, and Rule 23's superiority requirement better addresses manageability concerns anyway. Pet.App.14a-15a.

For all the talk of "procedural tools" and case-management "solutions," *Mullins, 795 F.3d at 664*, no court has suggested one that could actually work without endless mini-trials. That's because it can't be done. By definition, identifying class members in these cases can only be done person by person, through testimony about routine purchases made years ago (if ever).

Moreover, whatever courts may say about denying certification under other requirements, in reality their approach [**52] guarantees certification in cases like these. This case is proof. Conagra sold millions of bottles of Wesson Oil over the relevant class periods, and each absent class member will have to recall purchasing a bottle of oil within the last decade or so to make a claim. The Ninth Circuit promised that courts could take the prospect of myriad mini-trials into account under Rule 23's other requirements. Pet.App.13a. But in its unpublished decision addressing those requirements, it said nothing on the issue. If the prospect of countless individualized fact-findings wasn't worth mentioning here, it is hard to imagine where it would be. [*33] Indeed, the outcome is predetermined: because the Ninth Circuit "presume[s]" that class status should not be withheld "merely" because the class is unmanageable, and because it prefers classwide adjudication for cases involving "inexpensive consumer goods," Pet.App.15a, these problems will never stand in the way of certification.

2. The Ninth Circuit also reasoned that an ascertainability requirement is not needed to protect absent class members: due process does not require actual notice to them, those holding low-value claims are unlikely to [**53] opt out anyway, and excess damages can just be given to non-claimants through *cy pres*. Pet.App.15a-17a. Put more directly, the Ninth Circuit's point seems to be this: no one should worry about whether most absent class members even know about the litigation, because most of them won't care and because most of the money will end up going to some other organization anyway.

That is a strange explanation. The need to resort to publication notice--and the exceptionally low claims rates that result from such notice--are bugs, not features, of a system purportedly designed to vindicate individual rights. *See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174 n.12 (1974)* (problems with publication notice); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements, 59 Fla. L. Rev. 71, 120 (2007)* (noting that "shockingly low participation rates" such as "less than 5%" have "becom[e] ordinary"). Indeed, one member of this Court has already pointed out the serious problems raised by class actions that are in fact mechanisms for fining defendants to the benefit of class counsel and *cy pres* [*34] recipients, [**54] with absent class members left with little or nothing to show for their extinguished claims. *See Marek v. Lane, 134 S. Ct. 8, 9 (2013)* (mem.) (statement of Roberts, C.J., respecting the denial of certiorari) (noting the "fundamental concerns" raised by the "use of such remedies in class action litigation").

The Ninth Circuit similarly reasoned that those with real claims need not fret about those raising bogus ones: no consumer would "risk perjury charges" for a few dollars, and false claims can be screened through "auditing processes." Pet.App.18a. But Conagra is more concerned about motivated memory than premeditated perjury. The class representatives *themselves* could only guess about their purchases, *e.g.*, ER1345, and the prospect of an increased financial recovery might tempt people to round up, whether consciously or not. Moreover, the unspecified "auditing processes" to detect faulty memories do not exist. It is already difficult to verify whether someone has purchased Wesson Oil at all since 2007; it is much harder still to prove whether he bought two bottles or ten.

3. The Ninth Circuit also reasoned that allowing classes to go forward despite the [**55] impossibility of identifying absent class members does not harm defendants' rights. In the Ninth Circuit's view, defendants can challenge class representatives' purchases at certification, they can challenge other claimants later, and sometimes they need not be allowed to raise challenges at all because their liability, established in aggregate based on total items sold, will not change. Pet.App.19a-24a.

[*35] The first point is true as far as it goes, but that's not far. Defendants may challenge *every* class member's claim, not just the class representatives', and they cannot investigate individualized defenses--let alone raise them--if they do not even know who the absent class members are. *See Dukes, 564 U.S. at 366-67.* Moreover, pointing to the possibility of post-certification challenges *assumes* there will be thousands of mini-trials, an assumption that the careful application of Rule 23--at the *certification* stage, not later, *see Comcast, 133 S. Ct. at 1432*--was designed to prevent. It also blinks reality, where class certification virtually guarantees settlement. *See supra* 19-20. Finally, courts have "repeatedly rejected" [**56] the use of aggregate liability to avoid any needed individualized inquiry in litigated class actions, 2 MCLAUGHLIN ON CLASS ACTIONS § 8:16, including with respect to the issues that would likely arise here, *see, e.g., Abrams v. Interco Inc., 719 F.2d 23, 31 (2d Cir. 1983)* (Friendly, J.) (antitrust plaintiffs could not use fluid recovery given "the scores of different products involved, varying local market conditions, fluctuations over time, and the difficulties of proving consumer purchases after a lapse of five or ten years").

4. Ultimately, the Ninth Circuit grounded much of its decision on one overarching policy concern: if plaintiffs must put forward a method of identifying absent class members, no class will be certified, and no one will bring these low-value claims. *E.g.*, Pet.App.15a. Of course, cases like *Byrd* and *Community Bank* demonstrate that many low-value consumer class actions are ascertainable, just not the ones that are impossible to litigate without [*36] thousands of mini-trials. Moreover, it is hard to give this concern too much weight when, as the Ninth Circuit itself repeatedly pointed out, these cases aren't really about vindicating [**57] class members' rights anyway--virtually no one files a claim, and those who do receive at most a few dollars. Other mechanisms--regulatory action, injunctive relief, attorney general suits, and so on--are much better suited for thwarting diffuse but widespread wrongdoing. Using inherently unwieldy class actions to do so just gives the plaintiffs' bar and *cy pres* recipients a windfall at the expense of absent class members' and defendants' rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

ANGELA M. SPIVEY
MCGUIREWOODS LLP
1230 Peachtree St., NE
Suite 2100
Atlanta, GA 30309
(404) 443-5720

R. TRENT TAYLOR
MCGUIREWOODS LLP
Gateway Plaza
800 E. Canal St.
Richmond, VA 23219
(804) 775-1182

SHAY DVORETZKY
Counsel of Record
JEFFREY R. JOHNSON
JONES DAY
51 Louisiana Ave., NW

Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

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