No. 16-1221

IN THE

Supreme Court of the United States

CONAGRA BRANDS, INC.,
Petitioner,
v.
ROBERT BRISEÑO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

This case does not raise the Question Presented. According to Petitioner, the courts below ruled that *as a general matter* class actions could proceed as an abstraction with no need to identify any class members. This is false.

Rather, the courts below made four critical findings that define this particular case: (1) that all claims arose from the same course of conduct by the defendant, Pet. 23a-24a, 43a;[1] (2) that there was admissible evidence that would form the evidentiary basis for either an individual trial or a class trial, Pet. 23a, 50a-85a; (3) that the claims under the laws of eleven states allowed disgorgement of ill-gotten gains as a result of deceptive trade behavior, Pet. 23a-24a, 38a, 135a-247a; and (4) that under these circumstances, identification of individual absent class members *at this time* was premature, Pet. 20a-23a, 109a-12a.

Applying this approach to the numerous state law cases consolidated through Multidistrict Litigation transfer, the district court subjected the proof of class-wide harm to review under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and dismissed or did not certify class actions for the state law claims that required proof of individualized harm or specific reliance. The Ninth Circuit affirmed these findings, and the Petition does not challenge these dispositive findings.

Strikingly, only one year ago in *Tyson Foods*, *Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), the Court applied this same approach to hold that proof of individual

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[1] References to the Petition for Certiorari are designated "Pet. __" and to the appendix are designated "Pet. __a."

class member claims was "premature" in a case seeking to establish aggregate liability, as opposed to a compendium of individual damages actions. *Id.* at 1050. The reason is that "disgorgement is a form of '[r]estitution measured by the defendant's wrongful gain.'" *Kokesh v. Securities and Exchange Commission*, 581 U.S. ___ (2017); No. 16-529, slip op. at 2-3 (June 5, 2017) (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51, Comment *a*, p. 204 (2010)).

How does Petitioner distinguish *Tyson*? Simply by ignoring it. How does Petitioner address the hundreds of pages of fact-finding below on why disgorgement is proper under the certified state law claims? Also by ignoring them. Petitioner offers only a caricatured one paragraph treatment of the district court's two lengthy opinions. Because *Tyson* controls here, and because the factual record supports the approaches below, the heightened ascertainability issue that Petitioner seeks to raise is not properly presented. The acontextual Question Presented would not be reached under the facts of record.

Even on the Question Presented, Petitioner invokes an interpretation of Rule 23 that has no basis in its text and that is now the subject of harsh criticism among judges in the very Circuit that invented it. For all the rhetoric asserting that the fortuity of venue dictates the outcome of class certification, the conflict identified by Petitioner is fragile and is likely to resolve itself. Recent pathbreaking Circuit decisions, including *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016), have jettisoned Petitioner's heightened ascertainability approach in favor of fact-dependent rules that allow district courts effectively to manage class actions.

Courts across the country, as well as the current proposed changes to Rule 23, grapple with new technology and new means of both notifying class members and compensating them.

The Petition seeks to halt the development of the law, yet identifies no prejudice to any cognizable legal interests. The class of all consumers defined by their state of purchase during a set time frame provides closure to the litigation, win or lose. Petitioner raises the specter of fraudulent affidavits in resolving state law claims, despite the fact that sworn declarations are recognized as legally sufficient under the laws of all of the states from which the present cases arise. Indeed, sworn declarations formed a basis for the plaintiffs here to establish standing, and Petitioner does not challenge the use of such evidence for these class representatives. Here again, *Tyson* controls, for Petitioner is proposing a rule that treats individual plaintiffs differently from unnamed class members, contrary to *Tyson*'s holding that such an approach violates the Rules Enabling Act. 136 S. Ct. at 1046.

This is the third time in a little over a year that various defendants and amici have claimed an alarming Circuit conflict crying out urgently for certiorari. Petitioner and amici do not well mask their motive: to enable companies to commit wide-scale, but low value, harm to individual consumers with impunity, contrary to this Court's statement in *Amchem Products v. Windsor* that the class device is designed precisely for "vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" 521 U.S. 591, 617 (1997) (internal citation omitted). In the meantime, courts, including judges in the Third Circuit, have moved well beyond the cartoon version of conflict

presented in the Petition. And no Circuit has embraced the invitation Petitioner makes here to place allegations of widespread consumer fraud beyond the reach of the legal system.

STATEMENT OF THE CASE

A. The Underlying Deceptive Scheme.

In bottles prominently labeled "100% Natural," Conagra sells various cooking oils that include genetically modified organisms (GMOs). Pet. 4a, 43a; Compl. 19, 23-24.[2] Laboratories that create GMOs define them as having genetic "traits that are not naturally theirs," Compl. 21 (citing Monsanto's Glossary), modified to adopt traits that "would not appear in nature." Comp. 21-22. The World Health Organization defines GMOs as "altered in a way that does not occur naturally." Compl. 22. Numerous surveys find that consumers, too, think of GMOs as unnatural, ER5115-18, and in turn an overwhelming majority of consumers expect that a "natural" label means "no" GMOs were used in the product. ER3682; ER3947. While Conagra offers the truism that "'[n]atural' conveys different things to different people," Pet. 3, there is also a widespread consensus about what it does not mean. To producers, scientists, and, most importantly, consumers, "natural" does *not* mean a product made up of genetically engineered ingredients. Though the relative merits and demerits of GMOs spark much debate, there is widespread consensus that GMOs are "artificial," "engineered," and "synthetic"—that is, unnatural. Pet. 218a, 221a.

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[2] References to the Second Amended Complaint are designated "Compl. __" and can be found at record pages ER5862-913.

The allegations below turn on typical consumer understanding that "natural" foods do not contain GMOs. Significantly, the record below reveals Conagra's understanding that consumers were willing to pay a premium for natural foods. Pet. 216a, 247a. Yet, as the district court found, "consumers generally understand" the "100% Natural" label on Wesson oils "*inter alia*, as a representation that Wesson Oils do not contain GMOs." Pet. 218a. Conagra's strategy was to capitalize on this deceit.

The record is replete with evidence that Conagra knew consumers valued "natural" foods more highly—and profited from this knowledge. Conagra's marketers researched what messages appeal to consumers; Conagra then built the bottle design and marketing strategy on the finding that consumers prioritize health benefits, and in particular value all-natural products. *See*, *e.g.*, ER5118-21 (Conagra believed the "100% Natural" claim motivated Wesson purchasers). Consumer surveys confirm what Conagra knew: consumers prefer "natural" products and are willing to *pay more* for them. *See*, *e.g.*, Pet. 108a (discussing plaintiffs' damages model); ER5118, ER7558. Relying on consumer studies and Conagra's marketing research, the district court concluded that "consumers find the '100% Natural' claim material to their purchasing decisions." Pet. 216a.

While Conagra contends that natural foods may be made from genetically engineered ingredients, Pet. 3, Conagra was fully aware that consumers worldwide believe GMOs are not natural. Wesson executives knew of and shared internally studies from the European Union on consumer attitudes toward GMOs. ER3542. Multiple U.S. studies corroborate the consumer belief that GMOs are unnatural. *See* ER5115-21 (majority

believe "natural" foods are GMO-free). Sealed record materials further reveal that Conagra was aware of negative popular perceptions of GMOs. *See* ER3511, ER3515.

Indeed, Conagra's own consumers told the company that they thought GMOs were unnatural and were troubled by the Wesson Oil labeling the product "100% natural." Pet. 217a-18a; ER3078 (summarizing consumer feedback). Conagra was forced to draft a standardized corporate response to consumer complaints over GMOs. ER3449-50; *see also* ER5671-74.

Conagra asserts, both in internal communications and in its Petition, that the FDA does not set a legal definition for "natural" foods. Pet. 3; ER3002. As the district court stated, however, "[t]he relevant question" is what "a reasonable consumer" understood, "not how the FDA views genetically engineered foods." Pet. 219a-20a.

B. The Eleven State Claims.

At issue are eleven statewide classes certified to pursue eleven sets of state law claims, a subset of the many cases filed in various district courts around the country. The cases were consolidated for pretrial matters by the Judicial Panel on Multidistrict Litigation on a motion by Conagra, which sought transfer to the Central District of California,[3] and opposed a request by New Jersey plaintiffs to transfer the cases

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[3] *In re Wesson Oil Marketing and Sales Practices Litig.*, MDL No. 2291, 818 F. Supp. 2d 1383 (J.P.M.L Oct. 13, 2011) (ordering the transfer). The MDL panel had before it six independently-filed actions from California, New Jersey, Florida, and New York. Motion of Defendant ConAgra Foods, Inc. for Transfer, MDL No. 2291 at 4-6 (J.P.M.L. Aug. 4, 2011).

to the District of New Jersey. (Needless to add, New Jersey is in the Third Circuit.)[4]

Ultimately, the district court certified classes under the laws of California, Colorado, Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon, South Dakota, and Texas, Pet. 253a-54a, with all claims turning on genetically engineered foods being wrongly represented as "natural." Pet. 43a-44a; Pet. 250a-51a. Whether sounding in unjust enrichment, breach of warranty, or deceptive trade practices, the claims raised common questions and, as discussed below, admitted of common proof.

C. The Opinions Below.

1. District Court Opinions.

After first denying class certification without prejudice, Pet. 255a-348a, the district court granted class certification in a rigorous opinion covering more than 200 pages of the Appendix. Pet. 40a-254a.

Initially, the district court addressed Petitioner's challenges to the distinct aggregate damages models proposed by plaintiffs' experts. Applying *Daubert*, the court found admissible the testimony of Colin Weir, establishing that the price premium attributable to Conagra's "100% Natural" claim could be established using hedonic regression. Pet. 54a, 62a. The court

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[4] Defendant ConAgra Foods, Inc.'s Reply to the New Jersey Plaintiffs' September 8, 2011 Submission, MDL No. 2291 at 1 (J.P.M.L Sept. 14, 2011) (opposing any "East Coast" litigation). Amici's suggestion (*e.g.*, Br. for Amicus Curiae Grocery Mfrs. Ass'n at 3, 5, 7) of forum shopping in the "food court" of the Northern District of California, though admittedly witty, is pure fiction. The MDL assignment was to the Central District, not the Northern District, and it was *Conagra* that moved for MDL consolidation in that venue.

found that Weir's model could be used to perform state-by-state, temporally specific regression analyses to determine the price premium for each proposed state class. Pet. 60a. The court also found admissible under *Daubert* the testimony of Elizabeth Howlett, using conjoint analysis to isolate the price premium attributable to consumers' beliefs that the product contains no GMOs. Pet. 72a-76a. Combined, these models "would necessarily produce a damage figure attributable *solely to ConAgra's alleged misconduct*." Pet 231a.

The court also addressed Petitioner's objections to the admissibility of declarations filed by named plaintiffs to establish standing. Pet. 86a-101a. Although Petitioner claims here that affidavits of unnamed class members should be categorically excluded for ascertainability purposes, it recognized that the declarations of named plaintiffs could be challenged only on narrow grounds, such as conflict with prior deposition testimony. The district court refused to strike the declarations. *Id.*

Further, the court rejected Petitioner's arguments that the named plaintiffs lacked standing because they suffered no injury. Pet. 104a-08a. The court found that plaintiffs demonstrated the requisite "injury in fact" for standing by showing that a price premium could be attributed to Conagra's use of the "100% Natural" label. Pet. 108a. The court also recognized this as a uniform, cognizable injury suffered by the class as a whole. Petitioner does not challenge these findings in this Court.

Regarding ascertainability, the court reiterated that "[w]hile ... identifying class members may well require the creation of a claim form or declaration that those asserting membership in the class must submit (likely

under penalty of perjury)," that "procedure makes the class ascertainable, at least where the alleged mislabeling occurred throughout the class period, and on a single product or narrow group of products." Pet. 309a, reasserted at Pet. 112a.

With respect to Rule 23(a), the court found that the class satisfied numerosity, commonality, typicality, and adequacy of representation. Pet. 114a-24a.

The court also found that the class was suitable for monetary relief under Rule 23(b)(3). It reviewed the elements of the claims under each of the 11 states to determine which were "susceptible of classwide proof." *E.g.*, Pet. 147a, 158a. By contrast, claims where "individual issues" predominated were not certified or were dismissed entirely. *E.g.*, Pet. 147a-48a, 158a. Thus, surviving state law claims either do not contain individualized requirements, or allow them to be proven through common evidence, by reference to, *e.g.*, what a "reasonable consumer" would be deceived by or consider material. Pet. 137a-215a. *See*, *e.g.*, Pet. 159a-60a (Florida reliance can be proved on reasonable consumer basis); Pet 192a (Nebraska proximate cause provable on classwide basis through *Daubert*-approved damages methodology). As to materiality, survey evidence—and Conagra's own market research—could establish that a "reasonable consumer would understand" the "100% Natural" label to mean GMO-free, and would find this representation material. Pet. 218a; 216a. In turn, damages were "capable of measurement on a classwide basis," Pet. 227a (internal citation omitted), based on plaintiffs' expert testimony. Pet. 62a, 75a-76a.

Finally, the court found that Rule 23(b)(3)'s superiority requirement was satisfied. Conagra only challenged manageability. ER5395-97. Rejecting that challenge, the court found that the surviving claims

all raised common questions falling into consistent patterns. Pet. 249a-51a. The consumer protection and deceptive trade practice statutes all require a showing "that ConAgra's conduct is deceptive and misleads reasonable consumers and/or class members." Pet. 249a. The surviving unjust enrichment claims "require resolution of substantially the same question – whether ConAgra received some benefit from plaintiffs that it would be inequitable to allow it to keep in light of its conduct." Pet. 250a-51a. Lastly, the surviving breach of warranty claims "raise common questions regarding the warranty ... and whether it was breached because Wesson Oils contain GMO-ingredients." Pet. 251a.

2. Ninth Circuit Opinions.

Conagra sought interlocutory review under Rule 23(f), challenging the district court's findings on ascertainability, typicality, predominance, and superiority. Pet. 36a. The Ninth Circuit granted review and affirmed in two opinions.

First, in an initial opinion effectively unmentioned by the Petition, the court rejected Conagra's arguments regarding typicality, predominance, and superiority. Pet. 34a-39a. The claims of the class representatives were typical of those of the class because "none of the certified claims require a showing of actual reliance." Pet. 36a. There was sufficient evidence that a reasonable person would understand the "100% Natural" label to mean GMO-free. Pet. 37a. Critically, the court affirmed the finding that expert testimony supported the calculation of classwide damages. Pet. 38a. Finally, the court found no error in the district court's conclusion that "administering eleven statewide classes involving various state-law claims" was manageable. Pet. 38a.

In a second opinion, the court addressed heightened ascertainability (which the court called administrative feasibility). Pet. 1a-25a & 7a n.4. The court found no legal basis for such a requirement.

Applying "traditional tools of statutory construction," the court found that Rule 23(a) does not list "administrative feasibility" as a requirement. Pet. 8a-9a (internal citations omitted). The court deemed the omission material because "[f]ederal courts ... lack authority to substitute for Rule 23's certification criteria a standard never adopted." Pet. 10a (quoting *Amchem*, 521 U.S. at 622).

Analyzing both the Third Circuit's initial approach in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), and the Seventh Circuit's approach in *Mullins v. Direct Digital*, *LLC,* 795 F.3d 654 (7th Cir. 2015), the court concluded that *Mullins* was more persuasive. Pet. 12a. Although the Third Circuit was concerned about possible administrative burdens of trying a class action, "the manageability criterion of the superiority requirement" already provided "a specific, enumerated mechanism to achieve that goal," Pet. 13a, and Petitioner's argument would render Rule 23(b)(3)'s "manageability criterion largely superfluous." Pet. 9a-10a. Such "a stand-alone administrative feasibility requirement would invite courts to consider the administrative burdens of class litigation 'in a vacuum,'" as opposed to the cost/benefit approach of manageability. Pet. 14a-15a (internal citation omitted).

Regarding notice, the Circuit ruled that "neither Rule 23 nor the Due Process Clause requires actual notice to each individual class member." Pet. 15a. Nor was the court persuaded that individuals would submit fraudulent claims or that such fraudulent claims would dilute the recovery for valid claims. Pet. 18a-

19a. Fraud could be detected at the claims stage. Pet. 21a-22a.

With respect to the concern about class members offering only a "self-serving affidavit," Pet. 23a, the court noted that "[i]f a Wesson oil consumer were to pursue an individual lawsuit instead of a class action, an affidavit describing her purchases would create a genuine issue if ConAgra disputed the affidavit, and would prevent summary judgment against the consumer." Pet. 23a. Because affidavit testimony could "force a liability determination at trial without offending the Due Process Clause," the court saw "no reason to refuse class certification simply because th[e] same consumer will present her affidavit in a claims administration process after a liability determination has already been made." *Id.*

Finally, "the identity of particular class members does not implicate defendant's due process rights" in cases where defendant's liability will be calculated in the aggregate because "[t]he addition or subtraction of individual class members" does not affect the total damages owed to the class. Pet. 23a-24a (quoting *Mullins*, 795 F.3d at 670). Rather, when "the only question is how to distribute damages, the interests affected are not the defendant's but rather those of the silent class members." Pet. 24a (citation omitted). Here, aggregate liability can be determined by multiplying the price premium by the total number of units sold in the class period. Pet. 23.[5]

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[5] The court noted, moreover, that an ascertainability requirement was not necessary to allow Conagra to "meaningfully assert a *res judicata* defense in future actions." Pet. 19a n.9. Defendant's res judicata interest is amply protected "so long as the class

Accordingly, defining the class by an objective criterion is sufficient for certification, Pet. 6a, and "[a] separate administrative feasibility prerequisite to class certification is not compatible with the language of Rule 23." Pet. 4a.

REASONS TO DENY THE WRIT

The Petition should be denied for three reasons. First, the case does not pose the Question Presented by Petitioner. Second, Petitioner distorts the law in arguing that there is an entrenched Circuit conflict. Third, Petitioner has no legitimate claim that it will suffer prejudice by the decision below.

I. THE QUESTION PRESENTED IS NOT IMPLICATED BY THE ELEVEN STATE LAW CLAIMS.

Petitioner touts this case as "an excellent vehicle" for deciding the "heightened ascertainability" issue. Pet. 23. It concedes that this Court recently denied certiorari in two separate cases raising the identical issue, Pet. 25-28, but it disparages those prior cases as being "flawed vehicles" for deciding the issue. Pet. 25-27.[6] Yet, the factual record shows the present case to be the most flawed of all.

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definition in this action was clear (and ConAgra does not dispute that it is)." *Id.*

[6] One of the "flawed" certiorari petitions criticized by Petitioner was *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1493 (2016). Pet. 25-26. That Petition was filed by the same law firm that represents Petitioner here. Yet the *Rikos* petition similarly assured this Court that *Rikos* was an excellent vehicle for deciding the issue. Petition for Writ of Certiorari at 29-33, *Procter & Gamble Co. v. Rikos*, No. 15-835, 2015 WL 9591989 (December 28, 2015). (The Chamber, amicus here, was also amicus supporting certiorari in *Rikos*.)

Petitioner's Question Presented describes this case as involving a garden-variety "damages class," Pet. i, but that characterization obscures the true nature of the case certified below. Nowhere does the Petition acknowledge the class-wide nature of proof that will be adduced, the fact that all state law claims requiring individualized proof were stricken, or the fact that Petitioner's *Daubert* challenges were rejected, leaving intact plaintiffs' core liability and damages evidence. Importantly, the Petition does not seek review on any of those critical rulings. Instead, the Petition poses an abstract question—supported by flowery, inapt hypotheticals in its introduction, Pet. 1—that do not engage what the courts below held. In fact, the identity of individual class members is not only premature at this stage of the litigation, *it is unnecessary to establish the scope of Conagra's liability.*

The Ninth Circuit did not hold that class member identity was unnecessary in all cases, but rather that it was unnecessary *here* because this case turned on state law claims allowing for disgorgement of the price premium resulting from the aggregate misrepresentations. Pet. 23a ("identification of class members will not affect a defendant's liability in every case").

Where aggregate liability can be calculated based on the same admissible evidence that would be used in an individual claim, "the identity of particular class members does not implicate the defendant's due process interest at all ... nor the total amount of damages it owes to the class." Pet. 24a (quoting *Mullins v. Direct Digital*, *LLC*, 795 F.3d 654, 670 (7th Cir. 2015)). *See also* Pet. 205a (classwide proof under Oregon unjust enrichment law for "uniform treatment" by defendant); Pet. 206a-11a (defendant's "uniform" conduct allows classwide proof of harm under

South Dakota deceptive practices statute and common law unjust enrichment).

In *Tyson Foods*, *Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), the Court confronted the question of whether the total amount of wage underpayment could be established without proof of the amount claimed by each individual employee. Because that information was not available from the employer's records, the Petitioner argued that no class could be certified. This Court held to the contrary, based on how one would prove the case. Aggregate proof of liability to an entire class could be sustained if the evidence would "have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action." *Id.* at 1048. *Tyson* is never mentioned in the Petition, which evades the critical lesson that the need for individual proofs at the threshold liability stage is a matter of the underlying substantive law, not a requirement of Rule 23.

This case parallels the order of proof in *Tyson.* The district court made exactly the finding required by *Tyson* based on its *Daubert* rulings and the expert evidence of the differential price impact of the alleged deceptive conduct. Pet. 49a-88a. That evidence was ruled admissible for establishing the theory of liability and that factual ruling was both affirmed on appeal, Pet. 37a-38a, and not challenged before this Court. Accordingly, the aggregative expert methodology for assessing overall impact would have been admissible as evidence of liability in the trials of the 13 class representatives individually, and could be presented to establish classwide liability as well.

In turn, the district court found (again affirmed on appeal) that the misrepresentations alleged were common to all class members and that the claims of the

class representatives were typical of the whole. For state unjust enrichment and deceptive practices claims, the courts below ruled that the evidence could establish classwide liability, and Petitioner does not challenge those rulings here. Under such circumstances, as this Court held in *Tyson,* "the experiences of a subset ... can be probative as to the experiences of all of them." 136 S. Ct. at 1048. As in *Tyson*, an award based upon the totality of the wrongful gain of a defendant does not require identifying each class member at the threshold of the litigation. Accordingly, what *"methodology will be successful in identifying uninjured class members is a question that, on this record, is premature." Id.* at 1050 (emphasis added).

On the record below, and on the claims actually certified for classwide trial, this case is indistinguishable from *Tyson.*[7] How a claims process will function, and the level of proof required from claimants, are simply not relevant to establishing the scope of the defendant's alleged wrongdoing. Petitioner does not claim, nor could it, that there is a Circuit conflict or even a contested issue of law regarding the application of *Tyson* to claimant-specific issues where liability is based on the aggregate harm caused by defendant's alleged misconduct. Petitioner simply ignores these problems.[8] Yet, were this Court to grant review, these problems would be front and center in plaintiffs' merits briefing. In particular, given the state law claims at issue and plaintiffs' unchallenged expert testimony,

[7] The district court presciently anticipated *Tyson.*

[8] Thus, Petitioner devotes only one brief paragraph to summarizing the district court's two comprehensive opinions, which occupy about 300 pages of the appendix. Pet. 7. And it virtually ignores the Ninth Circuit's analysis contained in its first opinion, describing that as merely "addressing other criteria." *Id*.

plaintiffs would vigorously argue that the decision below should be affirmed (or review dismissed as improvidently granted) without reaching the Question Presented.

II. THE CLAIMED CIRCUIT CONFLICT DISSOLVES UPON EXAMINATION.

A. The Rules Enabling Act.

As the court below determined, a doctrinally imposed rule that affidavits could not serve as the basis for a class member's claim would push the boundaries of the Rules Enabling Act ("REA"), 28 U.S.C. § 2072. Pet. 21a. Thus, the court explained:

> If a Wesson oil consumer were to pursue an individual lawsuit instead of a class action, an affidavit describing her purchases would create a genuine issue if ConAgra disputed the affidavit, and would prevent summary judgment against the consumer ....
>
> Given that a consumer's affidavit could force a liability determination at trial without offending the Due Process Clause, we see no reason to refuse class certification simply because that same consumer will present her affidavit in a claims administration process after a liability determination has already been made.

Pet. 23a. Rule 56 specifically prescribes affidavits as permissible evidence to dispute summary judgment. *Id.* (citing Fed. R. Civ. P. 56(c)(1)(A)). And the laws of all eleven states at issue authorize the use of affidavits in a variety of circumstances[9] based on a standard of

[9] For example, proof by affidavit subject to perjury routinely suffices to initiate prejudgment attachment proceedings. *See*,

proof grounded in state law that is binding in federal cases arising under diversity jurisdiction.

In *Tyson*, this Court similarly held that because the statistical evidence at issue was admissible in an individual case, barring it in a class action would violate the Rules Enabling Act:

> In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot "abridge ... any substantive right." 28 U.S.C. § 2072(b).

Id. at 1046. The court below applied the same approach in rejecting heightened ascertainability. Pet. 23a. Because affidavit evidence can be used by individual plaintiffs to defeat summary judgment, it would violate the REA and *Tyson* to hold that affidavit evidence is automatically *foreclosed and inadmissible* as unreliable merely because the case is brought as a class action.

Petitioner simply ignores this critical analysis by the court below. Moreover, Petitioner does not dispute

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e.g., Cal. Civ. Proc. Code. § 484.030; Colo. R. Civ. P. 102; Fla. Stat. Ann. § 76.08; 735 Ill. Comp. Stat. Ann. 5/4-104; Tex. Civ. Prac. & Rem. Code Ann. § 61.022. Affidavits serve as claims of interest in estate law. *E.g.* Cal. Prob. Code. § 9151 (affidavits to establish creditor claims to estates); Texas Est. Code Ann. § 251.104(d) ("An affidavit ... is sufficient to self-prove the will."). Affidavits are also sufficient for legally binding claims in small claims courts. *See*, *e.g.*, Ind. St. Sm. Cl. Rule 10(B) (notice of claim sufficient to sustain default judgment); Neb. Rev. St. § 25-2804 (same); S.D. Codified Laws §§ 15-39-48, 15-39-50 (plaintiff's statement of the facts evaluated by the clerk for "sufficiency and clarity").

that plaintiffs' sworn declarations were sufficient to state claims as class representatives. Petitioner unsuccessfully tried to strike plaintiffs' declarations below, but does not seek review of that ruling. Thus, while Petitioner here maintains that unnamed class members should be categorically barred from using affidavits or declarations, it does not and cannot dispute that such evidence was proper to establish the individual plaintiffs' standing. It is difficult to imagine a more direct conflict with *Tyson* or the REA.

Tyson is important in yet another way. Petitioner and amici assert that, because the scrutiny of affidavits would raise individualized issues, class certification would not be proper under Rule 23(b)(3). Pet. 35; *see also*, *e.g.*, Br. for Amicus Curiae Chamber of Commerce at 6.[10] But Petitioner's argument that any individualized scrutiny *automatically* defeats certification has been thoroughly refuted. As *Tyson* stated:

> The predominance inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages *or some affirmative defenses peculiar to some individual class members*."

136 S. Ct. at 1045 (emphasis added; citations omitted).

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[10] Hereinafter Chamber Br.

Here, given the overarching issue of Conagra's liability, the minor effort to probe the affidavit of each class member is precisely the kind of individualized issue that, under *Tyson*, does not defeat class certification. As the court below noted, widely used back-end claims processing techniques enable defendants to mount individual challenges while preserving the efficiency of the class mechanism. Pet. 21a-22a.

No other Circuit has had the benefit of considering the Ninth Circuit's dispositive REA analysis. Furthermore, the key Third Circuit cases that lie at the heart of the Petition predate this Court's most recent engagement with the proper handling of aggregate claims within the limits imposed by the REA. It is highly unlikely that the Third Circuit will adhere to its prior approach, once it becomes aware that that approach conflicts with *Tyson* and the REA.

B. The Emerging Law.

Petitioner portrays the Circuit conflict on ascertainability as requiring review, arguing that prior "doubts about the scope or importance of the circuit split ... are gone now." Pet. 28. To the contrary, the case law is settling on the context-specific approach from the Seventh Circuit's *Mullins* decision, and recent ascertainability decisions have not yet integrated the Court's holding in *Tyson.* Indeed, every Circuit post *Mullins* that has taken up the issue in the first instance in a published opinion has embraced the Seventh Circuit's approach. It is likely that the Third Circuit, which invented the heightened ascertainability requirement, will follow suit. In the meantime, this Court should let the issue percolate before intervening.

1. Third Circuit Law.

The Third Circuit was the first circuit to identify a heightened ascertainability requirement in *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012), an opinion written by Judge Ambro. Almost immediately, members of that court began to raise concerns. In *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), decided the following year, a panel's reaffirmation of heightened ascertainability prompted Judge Ambro, writing for himself and three other judges, to dissent from the denial of rehearing en banc. Judge Ambro's opinion cited concerns that the new requirement "threaten[ed] the viability of the low-value consumer class action ...." *Carrera v. Bayer Corp.*, 2014 WL 3887938, at *1 (3d Cir. May 2, 2014) (Ambro, J., dissenting from denial of rehearing en banc). He noted that "how far we go in requiring plaintiffs to prove [the ability to ascertain class members] ... is exceptionally important and requires a delicate balancing of interests. It merits not only *en banc* review by our Court but also review by the Judicial Conference's Committee on Rules of Practice and Procedure." *Id.* The key question was "what does work to identify class members." *Id*. at *3.

For Judge Ambro, the heightened ascertainability test was not contained in Rule 23 but was merely an "implied" requirement that was "judicially created." *Id.* He thus urged that the requirement be relaxed where (as is true in the instant case) "a defendant's lack of records and business practices make it more difficult to ascertain the members of an otherwise objectively verifiable low-value class," and that "the consumers who make up that class should not be made to suffer." *Id.*

Third Circuit case law continues to evolve. In *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015), a suit alleging damages from spyware installed on purchased or leased computers, the Third Circuit emphasized that "*[t]he ascertainability inquiry is narrow*," *id.* at 165 (emphasis added), and *reversed* the denial of class certification on ascertainability grounds. *Id.* at 171. The court criticized the defense bar for "seiz[ing] upon [the] lack of precision [in the requirement] by invoking the ascertainability requirement with increasing frequency in order to defeat class certification." *Id.* at 162. *Byrd,* like other recent Circuit decisions, looked to the facts of the case to inquire first and foremost whether the proposed class definition would provide objective closure to the dispute. Under the facts presented, a class of purchasers or lessees of computers was not made unascertainable by the inclusion in the class of their "household members" because that phrase was "easily defined and not ... inherently vague." *Id.* at 170-71.

Importantly, Judge Rendell, in a concurring opinion in *Byrd*, went further. She noted that given "the lengths to which the majority goes in its attempt to clarify what our requirement of ascertainability means, and to explain how this implicit requirement fits in the class certification calculus, ... the time has come to do away with this newly created aspect of Rule 23." *Id.* at 172 (Rendell, J., concurring). She stated that "[o]ur heightened ascertainability requirement defies clarification," *id.*, and "narrows the availability of class actions in a way that the drafters of Rule 23 could not have intended." *Id.* She also noted that "[i]t is the trial judge's province to determine what proof may be required at the claims submission and claims administration stage." *Id.* at 173-74. By requiring claims proof up front, the requirement "puts the class action

cart before the horse and confuses the certification process." *Id.* at 174. The result is that, contrary to *Amchem*'s recognition that small claim cases are at the core of Rule 23, the requirement has "effectively thwarted small-value consumer class actions ...." *Id*. She then refuted all of the rationales offered in defense of heightened ascertainability and concluded that the requirement "contravenes the purpose of Rule 23 and ... disserves the public." *Id.* at 175-77.[11]

In arguing that the Third Circuit's law is fixed and permanent, Petitioner inexplicably ignores the growing dissatisfaction among Third Circuit judges—including the judge who authored the decision that originally created the requirement. Thus, Petitioner and two amici (the Chamber and National Association of Manufacturers) totally downplay *Byrd*, and two amici (Washington Legal Foundation and Grocery Manufacturers Association) fail to cite it at all. None even mentions Judge Rendell's concurrence.

Importantly, the Third Circuit has not had the chance to reconsider ascertainability in light of two seminal decisions, *Mullins* and the decision below.[12]

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[11] District courts within the Third Circuit have expressed similar concerns. *See*, *e.g*., *In re Processed Egg Prod. Antitrust Litig*., 312 F.R.D. 124, 141 n.13 (E.D. Pa. 2015) (questioning "why affidavits, which are by definition sworn under oath, are, for purposes of ascertainability, essentially considered incompetent evidence").

[12] Both opinions ground their analysis in the text of Rule 23 and demonstrate that the identification and compensation of absent class members is properly factored into a district court's assessment of the manageability and superiority of class treatment under Rule 23(b)(3). Pet. 13a; *Mullins*, 795 F.3d at 663 ("Imposing a stringent version of ascertainability ... renders the manageability criterion of the superiority requirement superfluous.").

But it soon will have the chance to do so. The Third Circuit has before it at least two cases in which the contours of heightened ascertainability have been squarely raised. First, ascertainability is the critical issue in *City Select Auto Sales*, *Inc. v. BMW Bank of N. Am. Inc.*, No. 15-3931 (3d Cir. argued Jan. 25, 2017).[13] And in *Gonzalez v. Owens Corning*, 317 F.R.D. 443 (W.D. Pa. 2016), *appeal docketed*, No. 16-2653 (3d Cir. June 2, 2016), ascertainability will again be an issue at argument in September. Regardless of outcome, petitions for rehearing en banc are a certainty. There is no reason to deprive the Third Circuit of the opportunity to re-evaluate its sorely criticized heightened ascertainability requirement in light of *Tyson* and *Mullins*.

2. Other Circuits.

To be sure, a few other circuits have weighed in on the side of the Third Circuit, but those opinions are, in general, conclusory. Petitioner greatly exaggerates the extent of reasoned agreement with the Third Circuit. Indeed, a number of the cases cited by Petitioner are not in conflict at all, as the court below notes. Pet. 11a

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[13] In *City Select*, a district court denied certification of a putative class of auto dealers for receipt of unsolicited fax advertisements in violation of the Telephone Consumer Protection Act. While the Plaintiffs submitted evidence that class members could be identified by a database of fax numbers in defendants' possession, the district court rejected certification on the ground that the database was over-inclusive. *City Select Auto Sales*, *Inc. v. BMW Bank of N. Am. Inc.*, No. 13-4595, 2015 WL 5769951, at *7 (D.N.J. Sept. 29, 2015). The Third Circuit granted Plaintiff's motion for a 23(f) review and heard oral argument on January 25, 2017, to address the use of affidavits at the claims stage, an issue controlled by *Tyson* but not yet reviewed by the Third Circuit.

n.6. In other instances, Petitioner relies on superficial unpublished decisions.

Second Circuit. In *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015), the Second Circuit held that the class *definition* was "insufficiently definite as a matter of law." *Id.* at 26. That followed settled Second Circuit decisions requiring that a class definition be "objectively determinable." *See*, *e.g.*, *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006). Petitioner and its amici nonetheless mistakenly cite *Brecher* to claim the Second Circuit has embraced the Third Circuit's heightened ascertainability. Pet. 14; Br. for Amicus Curiae Nat'l Ass'n Mfrs. at 9;[14] Chamber Br. at 9.

The court below correctly noted that "administrative feasibility played no role in the [*Brecher*] court's decision." Pet. 11a n.6. Petitioner's only response is to say that the analysis of the court below is "not true." Pet. 14 n.5. Petitioner and amici further ignore a more recent district court decision analysis, which (after citing *Brecher*) states that "*[t]he Second Circuit Court of Appeals has yet to weigh in on whether 'heightened' ascertainability is required.*" *Kurtz v. Kimberly-Clark Corp.*, No. 14-CV-1142, 2017 WL 1155398, at *45 (E.D.N.Y. Mar. 27, 2017) (emphasis added). That court, consistent with the Seventh and Ninth Circuits, ruled that a "plaintiff may rely on affidavits for those without a receipt" at the claims stage. *Id.* [15]

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[14] Hereinafter NAM Br.

[15] The only other recent Second Circuit opinion on the topic is a superficial, unpublished ruling. *See Leyse v. Lifetime Entertainment Services*, *LLC*, No. 16-1133, 2017 WL 659894 (2d Cir. Feb. 15, 2017). Rather than relying on settled law, the district courts in the Second Circuit are divided, both before and after *Brecher*.

Fourth Circuit. Petitioner and amici claim that *EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014), supports the Third Circuit. *See* Pet. 12, 13; NAM Br. at 9; Chamber Br. at 9. There, the Fourth Circuit expressly noted that "plaintiffs need not be able to identify every class member at the time of certification." *Id.* at 358. The implicit requirement "repeatedly recognized" by the Fourth Circuit is, like that in the Second Circuit, one of identification through "objective criteria." *Id*. Given the deficiencies of the class in *EQT* on traditional Rule 23 issues, the court below is correct that it is "far from clear" that the Fourth Circuit has adopted heightened ascertainability as an independent requirement for certification. Pet. 11a n.6.

Eleventh Circuit. Petitioners claim that *Little v. T-Mobile USA*, *Inc.*, 691 F.3d 1302 (11th Cir. 2012) somehow *held* that a class cannot be certified unless it is "adequately defined and clearly ascertainable." Pet. 15. But *Little* held no such thing—the court affirmed a denial of certification because plaintiffs failed to address the district court's finding of no predominance. 691 F.3d at 1306. Moreover, the court's authority for

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Compare Hughes v. The Ester C Co., 317 F.R.D. 333, 348-50 (E.D.N.Y. 2016) (acknowledging divisions and applying heightened ascertainability) *with Ebin v. Kangadis Food Inc*., 297 F.R.D. 561, 567 (S.D.N.Y. 2014) ("[A]scertainability difficulties ... should not be made into a device for defeating the action.") *and Goldemberg v. Johnson & Johnson Consumer Companies, Inc.*, 317 F.R.D. 374, 398 (S.D.N.Y. 2016) (joining Judge Rakoff in *Ebin* to find "that denial of class certification in consumer protection cases like these on the basis of ascertainability would severely contract the class action mechanism"). Petitioner notes uncertainty in the district courts of the Eighth Circuit on this issue, Pet. 19, but inexplicably fails to acknowledge that district courts have likewise found no definitive guidance from the Second Circuit.

the ascertainability requirement consists of two Fifth Circuit cases that manifestly do not require heightened ascertainability. *Id.* at 1304 (citing *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) ("patent uncertainty" of class defined as participants in "peace movement" not "adequately defined and clearly ascertainable") and *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) (procedural waiver of ascertainability issue on appeal)).[16]

Circuits that Have Not Addressed Ascertainability. The First, Fifth,[17] Tenth, and D.C. Circuits have not ruled one way or the other on heightened ascertainability. But notable post-*Mullins* cases from

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[16] The remaining Eleventh Circuit decisions cited by Petitioner are unpublished and/or superficial. Only *Karhu v. Vital Pharmaceuticals, Inc.*, 621 Fed. App'x 945 (11th Cir. 2015), addresses heightened ascertainability with more than passing consideration. There, the plaintiff did not even address how claims would be made, and the district court on its own found that affidavits would defeat ascertainability. The Eleventh Circuit affirmed, because "[w]ithout a specific proposal as to how identification via affidavit would successfully operate, the district court had no basis to accept the method." *Karhu*, 621 Fed. App'x at 949. Judge Martin concurred in the judgment on the basis of plaintiff's waiver of the affidavit argument, but wrote separately "to address the problems" with applying heightened ascertainability to classes asserting low-value consumer claims. *Id.* at 951-54 (Martin, J., concurring).

[17] District courts in the Fifth Circuit are consistent with *Mullins* and the opinions below. *See Rodriguez v. Flowers Foods, Inc.*, No. 4:16-CV-245, 2016 WL 7210943, at *5 (S.D. Tex. Dec. 13, 2016) (requiring only "general outlines" of class membership at outset, even if individual testimony required subsequently); *Sartin v. EKF Diagnostics, Inc.*, No. CV 16-1816, 2016 WL 7450471, at *6 (E.D. La. Dec. 28, 2016) (same); *Seeligson v. Devon Energy Prod. Co., L.P.*, No. 3:16-CV-00082-K, 2017 WL 68013, at *3 (N.D. Tex. Jan. 6, 2017) (same).

federal district courts in Kansas and New Hampshire are instructive. In *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2391, 2016 WL 5371856, at *3 (D. Kan. Sept. 26, 2016), the court discussed Third Circuit law as well as *Mullins.* Noting that the Tenth Circuit had not addressed the issue, *id.* at *2, it concluded that it was "persuaded by the thorough and well-reasoned analysis of the Seventh Circuit in *Mullins.*" *Id* at *3. It thus "decline[d] Syngenta's invitation" to apply the heightened ascertainability standard. *Id.* The Tenth Circuit denied review under Rule 23(f), but did note that the district court's opinion was "well-researched and reasoned." Order Denying 23(f) Petition, *In re Syngenta AG MIR 162 Corn Litig.*, No. 16-607 (10th Cir. Dec. 7, 2016).[18] And in *In re Dial Complete Mktg. & Sales Practices Litig.*, 312 F.R.D. 36, 51 (D.N.H. 2015), the court was "not persuaded by the reasoning of *Carrera* and its progeny." Instead, the court quoted Judge Rendell's *Byrd* concurrence at length and applied *Mullins*, offering a strong defense of the sufficiency of affidavits in low-value consumer claims. *Id.* at 51-52.

In sum, Petitioner ignores crucial evidence that the Circuit conflict is likely to resolve itself. As one commentator has noted, *Mullins* and *ConAgra* "could engender new thinking" and thereby enable the Circuits to "largely repair[]" the Circuit conflict.[19] Given

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[18] Given *Syngenta,* the claim (Chamber Br. 12-13) that the Tenth Circuit has implicitly adopted the Third Circuit's approach to heightened ascertainability is plainly incorrect.

[19] Fred Taylor Isquith, *ConAgra Opinion May Repair Ascertainability Circuit Split*, LAW360 (Jan. 20, 2017, 3:35 PM), https://www.law360.com/articles/882159/conagra-opinion-may-repair-ascertainability-circuit-split.

the current state of play in the courts, this Court should deny review.[20]

III. EVERY LEGAL INTEREST OF THE PETITIONER IS PROTECTED BY THE RULING BELOW.

For all the rhetorical fury about how "this has to stop," Pet. 28, Petitioner fails to identify a single legally protected interest not honored by the courts below. Petitioner may wish the class action device to go away, precisely because the low individual stakes of the case would render any challenge to its allegedly deceptive practices impossible. But Petitioner has no legal right to engage in deceptive conduct in violation of state law, and the certification of a class does not infringe Petitioner's rights.

First, and foremost, the precise class definition offers Petitioner full preclusive protection following any judgment. Win or lose, there will be no further claims for this deceptive conduct brought by any consumer (absent individuals opting out) for the purchase of any of the Wesson products in any of the 11 states during the class period. The class is defined by the objective

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[20] Review at this time is not appropriate for an additional reason: the House recently passed a bill that would codify the strictest version of heightened ascertainability. The bill provides that there must be an "administratively feasible mechanism (a) for the court to determine whether putative class members fall within the class definition and (b) for distributing directly to a substantial majority of class members any monetary relief secured for the class." Fairness in Class Action Litigation Act, H.R. 985, 115th Cong. § 1718(a) (as passed by the House of Representatives, Mar. 9, 2017). The bill is now awaiting action in the Senate. The Court should allow the legislative process to play out before intervening.

fact of having purchased Wesson oil, not by the subjective belief of individuals or by a legal finding of wrongdoing (the problem of fail-safe class definitions).

Second, the Petition challenges the adequacy of any notice, assuming incorrectly that mail notice is either the only or the best means of notifying the class. Pet. 29. As the pending revisions to Rule 23 make clear,[21] means of communication have evolved considerably since *Mullane v. Central Hanover,* 339 U.S. 306 (1950). The proposed Rules amendments anticipate that social media and web communications will often be the most effective means of notice, something that does not disrupt any expectations of Petitioner. As the Court recently noted, initiating litigation implicates "a purely procedural requirement" and does not govern "what [the] substantive outcome will be on the issues in dispute." *BG Group v. Argentina*, 134 S. Ct. 1198, 1207 (2014).

Today, there are Silicon Valley firms that offer outreach to any group of consumers based on an amalgam of customer loyalty programs, other comparable purchases, and a host of data analytics unimaginable a generation ago.[22] Modern marketing is not a passive

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[21] *See* Committee on Rules of Practice and Procedure, Report of the Advisory Committee on Civil Rules at 432 (June 12-13 2017), http://www.uscourts.gov/sites/default/files/2017-06-standing-agenda_book_0.pdf (authorizing notice by "electronic means").

[22] Conagra's own data analytics/marketing firm, Salesforce DMP, advertises its ability to identify individual consumers "regardless of how, when, or where they interact with your brand" and "reach precise audiences," *Identity*, Salesforce DMP (last visited June 10, 2017), http://www.krux.com/platform/intelligent-marketing-hub-dmp/data-identity-management, including specific capabilities in "identify[ing] each unique individual." *Cross Device Identity Management*, Salesforce DMP (last visited June 10,

project of putting a product on the shelf with the hope that it catches the consumer's eye.[23] Rather, all marketers seek to contact purchasers and direct targeted ads to them on their electronic devices, sending specially designed product discounts, and other means of gaining repeat customer loyalty. Conagra's own publications proclaim that the company "communicate[s] via social and traditional media channels" and is in "daily contact with many of [its] customers."[24]

Petitioner complains that there was no plan of distribution or communication presented as a precondition of class certification. Pet. 24. The simple answer, as both *Mullins* and the decision below have held, is that there is no requirement in the text of Rule 23 that all managerial steps for effectuating the remedial phases of the litigation occur at the threshold determination of the joinder of claims. Pet. 21a-23a. As the Court noted in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, this "put[s] the cart before the horse." 133 S. Ct. 1184, 1191 (2013).

This Court has long accepted the use of class actions to adjudicate a common course of conduct, leaving the administration of any potential remedies to subsequent phases of litigation. For example, in *Dothard*

2017), http://www.krux.com/data-management-platform-solutions/identity-management/.

[23] As Conagra's head of publicity explained, "[d]ata and analytics [are] a central part of ConAgra's marketing approach. They allow us to narrow in on the right consumer." Gar Smyth et al., *It's Time to Double Down on Data*, ANA (Apr. 14, 2016), http://www.ana.net/magazines/show/id/ana-2016-apr-double-down-data.

[24] ConAgra Foods Citizenship Report 8 (2016), http://www.conagrabrands.com/sites/g/files/qyyrlu371/files/2017-02/2016_ConAgra_Foods_Citizenship_Report_Updated_2.15.17.pdf.

v. Rawlinson, 433 U.S. 321 (1977), the Court entertained a challenge to prison employment practices on behalf of a class representing "all women who might be employed" but for the challenged practice. *Mieth v. Dothard*, 418 F. Supp. 1169, 1172 (M.D. Ala. 1976), *aff'd in part*, *rev'd in part sub nom. Dothard v. Rawlinson*, 433 U.S. 321 (1977). That class, like the present one, clearly defined the boundaries of the claims that were to be conclusively resolved by the litigation, even if exact eligibility for relief, if any, would be established only after a finding of liability.

Third, Conagra is protected from liability stemming from uncontested claims. As both courts below found in upholding certification, the claimed harm is the difference between the market price for "Natural" oils and that for standard grade cooking oil. Conagra's internal marketing information reveals that the company well understood the price differential and that the labeling was designed to capture that premium. The remedy for wrongful enrichment is recognized under the 11 state consumer protection laws and stands independent of how individual class members establish their claim for compensation.[25]

Nor are Conagra's rights infringed if class members file rebuttable affidavits setting forth their claimed harms. Unmentioned by Petitioner is the fact that these claims are all governed by the substantive requirements of state law. Each of the 11 states at issue recognizes the use of affidavits or declarations for all manner of important transactions.[26] The use of

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[25] "A person is not permitted to profit by his own wrong." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 (2010).

[26] *See supra* note 9 for examples.

sworn declarations subject to the laws against perjury is a common feature of the U.S. legal system, federal and state, including in standard federal court practice,[27] and is not an unreliable expedient invented for this class action.

Class representatives submitted such a declaration, and each was subject to challenge, attempted refutation, and judicial findings. Pet. 86a-101a, 106a. Petitioner does not here challenge such declarations as proper evidence to prove the named plaintiffs' standing and thus cannot plausibly argue that this same kind of evidence should be barred for absent class members.

Paradoxically, Petitioner simultaneously claims that (1) there will be masses of illegitimate claims, Pet. 34, *and* (2) that there will not be any claims, Pet. 36. No support is offered for the first contention; indeed, the above discussion (at 4-7) shows that the claims are anything but illegitimate. As to the latter contention, Petitioner ignores the power of the Internet—a power recognized in recent proposed changes to Rule 23. The advent of social media permits not only new forms of notice but also an unprecedented level of class involvement at the claims stage.[28] Nowhere do the Federal

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[27] *See*, 28 U.S.C. § 1746 (giving force and effect to declaration submitted under penalty of perjury).

[28] For example, in two recent consumer cases, involving milk pricing and deceptive practices by an energy drink, hundreds of thousands of class member filed claims for small recoveries. *See Edwards v. National Milk Producers Federation*, No. 11-04766, 2014 WL 4643639 (N.D. Cal. Sept. 16, 2014); *Careathers v. Red Bull North America, Inc.*, No. 13-8008, 2015 U.S. Dist. LEXIS 97533 (S.D.N.Y. May 12, 2015). There is already similar social media attention to the instant case in the large pro-natural foods, anti-GMO online communities. *See*, *e.g.*, Dr. Joseph Mercola (@doctor.health), Facebook (Nov. 25, 2011), https://www.

Rules anticipate the threshold heightened ascertainability test that Petitioner seeks to apply in every class action.

CONCLUSION

The Petition should be denied.

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facebook.com/doctor.health/posts/280598801982873 (commenting on Conagra litigation on site with over 1.5 million followers).