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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE CIRCUITS ARE DIVIDED 1

II. THIS CASE IS A GOOD VEHICLE 6

III. THE DECISION BELOW IS WRONG 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co., 2017 WL 2464674 (S.D. Fla. June 7, 2017) 4

Abraham v. Ocwen Loan Servicing, LLC, 2017 WL 2734280 (E.D. Pa. June 26, 2017) 1

Brecher v. Republic of Argentina, 806 F.3d 22 (2d Cir. 2015) 2, 3

Bruton v. Gerber Prods. Co., __ F. App'x __, 2017 WL 1396221 (9th Cir. Apr. 19, 2017) 1

Byrd v. Aaron's Inc., 784 F.3d 154 (3d Cir. 2015) 2, 5

Careathers v. Red Bull N. Am., Inc., 2015 U.S. Dist. LEXIS 97533 (S.D.N.Y. May 12, 2015) 11

Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013) 2, 5, 6

Carrera v. Bayer Corp., 2014 WL 3887938 (3d Cir. May 2, 2014) (Ambro, J., dissenting sur denial of petition for rehearing en banc) 2

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Edwards v. Nat'l Milk Producers Fed'n,
2014 WL 4643639
(N.D. Cal. Sept. 16, 2014) 11

EQT Prod. Co. v. Adair,
764 F.3d 347 (4th Cir. 2014) 3

Gazzara v. Pulte Home Corp.,
2017 WL 1331364
(M.D. Fla. Apr. 11, 2017) 1, 4

In re Atlas Roofing Corp. Chalet Shingle Prods. Liab. Litig., __ F.R.D. __,
2017 WL 2492579
(N.D. Ga. June 9, 2017) 1, 4

Jarzyna v. Home Props., L.P.,
__ F.R.D. __, 2017 WL 2061688
(E.D. Pa. May 15, 2017) 1

Karhu v. Vital Pharms., Inc.,
621 F. App'x 945 (11th Cir. 2015) 3

Leyse v. Lifetime Entm't Servs., LLC,
2017 WL 659894
(2d Cir. Feb. 15, 2017) 3

Little v. T-Mobile USA, Inc.,
691 F.3d 1302 (11th Cir. 2012) 3

Marcus v. BMW of N. Am., LLC,
687 F.3d 583 (3d Cir. 2012) 3

Microsoft Corp. v. Baker,
137 S. Ct. 1702 (2017) 12

Mullins v. Direct Digital, LLC,
795 F.3d 654 (7th Cir. 2015) 2, 9, 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Tyson Foods, Inc. v. Bouaphakeo,
136 S. Ct. 1036 (2016) .... *passim*

OTHER AUTHORITIES

Fed. R. Civ. P. 23 .... 5, 7, 12

Every day, courts across the country reach inconsistent decisions about whether to certify classes of hard-to-identify plaintiffs. Pet.21-23 & nn.6-7. Since Conagra filed its petition, things have only gotten worse.[1] Contrary to Plaintiffs' arguments, there is no reason to believe all four circuits that require ascertainability will change course. Nor will any vehicle problem stop this Court from reaching the Question Presented.

I. THE CIRCUITS ARE DIVIDED.

Plaintiffs admit (BIO 21, 24) that, unlike the decision below, several circuits require plaintiffs to provide a feasible method for identifying absent class members. But they claim (BIO 17-27) that the split might go away on its own. It won't. The Third Circuit already rejected calls to overrule itself, and *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016)—which said nothing about ascertainability—will not lead any circuit to change positions.

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[1] *Compare Bruton v. Gerber Prods. Co.*, __ F. App'x __, 2017 WL 1396221, at *1 (9th Cir. Apr. 19, 2017) (vacating denial of a class of purchasers of certain baby foods with particular labels), *with Abraham v. Ocwen Loan Servicing, LLC*, 2017 WL 2734280, at *42-*46 (E.D. Pa. June 26, 2017) (denying a class because "plaintiffs present[ed] no evidence as to how to identify putative members"); *In re Atlas Roofing Corp. Chalet Shingle Prods. Liab. Litig.*, __ F.R.D. __, 2017 WL 2492579, at *4 (N.D. Ga. June 9, 2017) (denying a class of those who purchased certain shingles); *Jarzyna v. Home Props., L.P.*, __ F.R.D. __, 2017 WL 2061688, at *6 (E.D. Pa. May 15, 2017) (denying a class of tenants who paid a particular fee); *and Gazzara v. Pulte Home Corp.*, 2017 WL 1331364, at *4 (M.D. Fla. Apr. 11, 2017) (denying a class of homeowners whose stucco had particular code violations).

1. Plaintiffs halfheartedly attack the split, arguing (BIO 21-23) that the Third Circuit's position is unsettled because *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015), demanded only an "easily defined … and not inherently vague" class. But *Byrd* approved certification because the class was properly defined *and* because the plaintiffs' plan to identify class members by combining known addresses with "additional public records" was "neither administratively infeasible nor a violation of Defendants'" rights. 784 F.3d at 171, 172. *Byrd* reaffirmed *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); it did not undermine it.

Plaintiffs next argue (BIO 22-24) that the Third Circuit will change its position. But it has already rejected calls to reverse course; Judge Ambro's dissent from the denial of rehearing en banc in *Carrera* is a *dissent*, after all. *See* 2014 WL 3887938, at *1-*3 (3d Cir. May 2, 2014) (Ambro, J., dissenting). Indeed, the Third Circuit rejected those calls in the face of the same arguments adopted by *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), and the decision below. *See, e.g.*, Professors of Civil Procedure and Complex Litigation Amicus Br. 4-10, Dkt. 67, *Carrera*, No. 12-2621 (3d Cir.). The Third Circuit will not change its mind now.

Even if it did, there would *still* be a split. *Brecher v. Republic of Argentina*, 806 F.3d 22, 26 (2d Cir. 2015), held that class plaintiffs must propose an "objective," "readily identifiable class." Plaintiffs parrot (BIO 25) the Ninth Circuit's statement that *Brecher* turned on the objectivity of the class definition, asserting that Conagra's "only response is to say … 'not true.'"

That's, well, not true. As Conagra explained (Pet.14 & n.5), *Brecher* held that "*[e]ven if* there were a method by which the beneficial interests could be traced"—thus objectively identifying the class's members—"determining class membership would require the kind of individualized mini-hearings that run contrary to the principle of ascertainability." 806 F.3d at 26 (emphasis added). Plaintiffs ignore this part of *Brecher*. They also cannot explain the Second Circuit's recent reliance on it in denying certification where the plaintiff "failed to show a sufficiently reliable method for identifying the proposed class [without] mini-hearings." *Leyse v. Lifetime Entm't Servs., LLC*, __ F. App'x __, 2017 WL 659894, at *2 (2d Cir. Feb. 15, 2017), *pet. for reh'g en banc denied*, Dkt. 90 (Apr. 11, 2017).

The Fourth and Eleventh Circuits would also have to switch sides. Plaintiffs repeat (BIO 26) the Ninth Circuit's statement that it is "far from clear" that *EQT Production Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014), followed the Third Circuit's approach. But *Adair* held that class litigation is "'inappropriate'" if class members cannot be "'identif[ied] without extensive and individualized fact-finding.'" *Id.* at 359 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)). How much clearer could it get?

The Eleventh Circuit is no different. In *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1303-04 (11th Cir. 2012), the court discussed ascertainability as part of the "law governing class certification," and in *Karhu v. Vital Pharmaceuticals, Inc.*, 621 F. App'x 945, 947-50 (11th Cir. 2015), it applied that law to affirm the denial of certification where the plaintiff

had not proposed an administratively feasible method of identification. District courts within the Eleventh Circuit have also recently enforced *Little*'s ascertainability requirement.[2] Plaintiffs are the only ones who doubt whether the Eleventh Circuit takes ascertainability seriously.

This entrenched split isn't going away.

2. Plaintiffs insist (BIO 18-20) that *Tyson* will spur these four circuits to reconsider. Plaintiffs' new counsel deserves points for creativity: despite its supposed importance, Plaintiffs never brought *Tyson* to the Ninth Circuit's attention, the Ninth Circuit never mentioned it, and, to Conagra's knowledge, no court has relied upon it when addressing ascertainability.

That's because it is irrelevant. Per Plaintiffs (BIO 19), *Tyson* matters because it disproves Conagra's supposed claim that absent class members are "categorically barred from using affidavits or declarations" to identify themselves; under the Rules Enabling Act, evidence that may be used in individual litigation may also be used to uphold class certification. *See* 136 S. Ct. at 1046-49.

Conagra never argued that affidavits are categorically inadmissible. Instead, it and the circuits on its side highlighted the dilemma posed by

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[2] *See A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 2017 WL 2464674, at *3 (S.D. Fla. June 7, 2017) (certifying because class members could "easily [be] identified" through "searchable electronic records"); *Atlas Roofing*, 2017 WL 2492579, at *3-*4 (denying certification); *Gazzara*, 2017 WL 1331364, at *4 (same).

these classes: either absent class members' say-so suffices to establish class membership (trampling defendants' and absent class members' rights), or there must be myriad mini-trials to *test* the affidavits (contravening Rule 23). *See* Pet.29-30; *Carrera*, 727 F.3d at 307-08. *Tyson* says nothing about this.

Plaintiffs also assert (BIO 19) that *Tyson* defeats Conagra's "argument that any individualized scrutiny *automatically* defeats certification." *Tyson* noted that common issues may predominate where "some affirmative defenses peculiar to some individual class members" must be tried separately. 136 S. Ct. at 1045. The "minor effort" required to "probe the affidavit[s]" of claimants is supposedly (BIO 20) such an issue here.

But neither Conagra nor the circuits on its side think that the mere presence of an individualized issue defeats certification. *See* Pet.28-31; *Byrd*, 784 F.3d at 170-71. Instead, they insist upon proof that it really will take only "minor effort" to identify class members—in other words, that there is a reliable method for doing so—to ensure that individualized issues will not swamp common ones.

If anything, *Tyson* supports Conagra. There, every employee was known, but some had not spent uncompensated time donning and doffing. *See* 136 S. Ct. at 1050. The Court affirmed because the employees proposed methods for "distributing the award to only those individuals who worked more than 40 hours," including one that used existing records and the jury's findings. *Id.* Plaintiffs here refuse to propose *any* method for reliably identifying everyone who bought Wesson Oil in eleven states

over a decade, and it can't be done. *Tyson* simply will not lead four circuits to reconsider their position.

II. THIS CASE IS A GOOD VEHICLE.

The Ninth Circuit began: "This appeal *requires* us to decide whether … class representatives must demonstrate … an 'administratively feasible' means of identifying absent class members." Pet.App.3a (emphasis added). Plaintiffs nevertheless contend (BIO 13-14) that this case "does not pose the Question Presented" because they propose to determine Conagra's aggregate liability, so Conagra has no need to identify absent class members. Plaintiffs' attempted end-run around ascertainability—not passed on below, and in conflict with Plaintiffs' own authorities—only confirms the circuit conflict.

1. Per Plaintiffs, the Ninth Circuit held that Conagra's liability will be established in aggregate, thereby depriving Conagra of any right to dispute individual claims and any need to identify absent class members. The *Carrera* plaintiffs likewise argued that establishing the defendant's aggregate liability eliminated the need for ascertainability. But *Carrera* reaffirmed the ascertainability requirement, because ascertainability "protects absent class members"—whose recoveries may be diluted by bad claims—"as well as defendants." 727 F.3d at 310. Even if Plaintiffs rightly described the decision below, then, that would not create a vehicle problem; it would underscore the split, and the need for this Court's intervention.

2. Plaintiffs' reading of the decision below is wrong anyway. The panel uniformly rejected an

ascertainability requirement, not just in cases involving aggregate liability. Its conclusion was categorical: "[T]he language of Rule 23 does not impose a freestanding administrative feasibility prerequisite to class certification," and it "decline[d] to interpose" one on its own. Pet.App.10a.

Because it "recognize[d]" the split, however, the court considered whether ascertainability was "necessary" to protect various interests, including defendants' rights. Pet.App.11a-12a. The court noted that defendants may always challenge the named plaintiffs' claims, Pet.App.20a-21a, and it reasoned that they may "individually challenge" absent class members' claims later, Pet.App.21a. It also suggested that in some cases involving aggregate liability, defendants may have no reason to challenge claims. Pet.App.23a-24a.

On Plaintiffs' view (BIO 1, 14), this last part of the panel's opinion "f[ound]" that state law "allowed disgorgement" of the price premium attributable to the alleged misrepresentations and therefore "h[eld]" that "class member identity" was "unnecessary *here*," not "in all cases." Plaintiffs' reading can't be squared with the court's categorical holding or with its recognition that it was taking sides in the split. Pet.App.25a. Nor can it be squared with the court's statements about Conagra's rights. The court said the ability to "individually challenge" absent class members' claims sufficed to protect "*Conagra['s]* … due process rights," Pet.App.21a-22a (emphasis added), and reasoned that, while "*Conagra* may prefer to terminate this litigation in one fell swoop … rather than *later challenging each individual class member's claim*," Conagra has no right to a "*cost-*

effective procedure" for doing so, Pet.App.23a (emphasis added). Indeed, Plaintiffs' reading can't even be squared with the sentence they cite. The court merely noted that "Plaintiffs *propose[d]*" to establish Conagra's aggregate liability, not that they could lawfully do so. Pet.App.23a (emphasis added).

What the Ninth Circuit *didn't* say is just as telling as what it did. According to Plaintiffs' BIO, as a matter of state law, once a single named plaintiff establishes a misrepresentation, the defendant's aggregate liability is fixed: the defendant must disgorge all profits attributable to the misrepresentation from all sales, regardless of whether any other claimants prove they actually purchased the product. To evaluate that argument, the Ninth Circuit would have had to analyze eleven states' laws. But Plaintiffs never cited any such authority to the Ninth Circuit. And the panel never *mentioned* disgorgement or unjust enrichment, nor did it analyze the law of a single state.[3]

Nor did the district court hold that Conagra lacks the right to challenge individual claims. To be sure, it concluded that, under some states' laws, Plaintiffs

[3] For similar reasons, Plaintiffs' latest *Tyson* argument (BIO 15-17) also fails. *Tyson* turned on two considerations: the FLSA authorizes representative evidence of damages where employers keep inadequate records, *see* 136 S. Ct. at 1046-48, and plaintiffs had proposed methods for keeping damages out of the hands of known-but-uninjured class members. *See id.* at 1050. Neither is present here. The Ninth Circuit never adopted Plaintiffs' theory of aggregate liability, and Plaintiffs have proposed no method for identifying the host of *unknown* class members or for keeping false claims out.

could use classwide proof that a reasonable consumer would have relied upon the supposed "no GMO" meaning of Conagra's "100% Natural" labels. Pet.App.135a-226a. It also concluded that Plaintiffs could tie their theory of liability to classwide proof through the price premium that Conagra supposedly received. Pet.App.227a-247a. But it *never* held that Conagra had no right under the law of eleven states to challenge *whether* a class member purchased Wesson Oil at all. Quite the opposite. It *accepted* that some individualized damages issues—such as the number of bottles purchased by each consumer—remained, but held that common questions predominated over them. Pet.App.246a n.285. And it rejected ascertainability only because it worried about consumer class actions and speculated that consumers could self-identify here anyway. Pet.App.108a-112a, 309a.

Thus, neither court below held that Conagra lacks the right to challenge individual claims, let alone relied on such a holding in rejecting an ascertainability requirement. Because the panel held that there is no ascertainability requirement *even if* Conagra has the right to challenge every claim, this Court need not and should not be the first to consider the state-by-state underpinnings of Plaintiffs' BIO argument.

3. Conagra may challenge individual claims in any event. *Mullins*—the case the panel relied upon for this point, Pet.App.24a—recognized as much. In "[m]ost consumer fraud class actions," "the total amount of damages cannot be determined in the aggregate," even if there is a "common method of determining individual damages." 795 F.3d at 670.

Thus, because "the defendant's due process interest is implicated," it has a right "to challenge … damages awards for particular class members." *Id.* at 671. Per *Mullins*, however, these myriad individual inquiries still do not demand an ascertainability requirement, since "the need for individual damages determinations … does not itself justify the denial of certification." *Id.* Plaintiffs at times take the same tack. They argue (BIO 32-33) that "Conagra's rights" are protected so long as class members "file *rebuttable* affidavits," "subject to challenge, attempted refutation, and judicial findings" just like the class representatives'.

At this point, the jig is up: *Mullins* and (sometimes) Plaintiffs themselves recognize Conagra's right to dispute each claim, arguing instead that the logistics for those inquiries may be addressed after certification rather than before. That, however, is the precise disagreement between those circuits that recognize an ascertainability requirement and those that do not. This case is a great vehicle for resolving that split.

III. THE DECISION BELOW IS WRONG.

Finally, Plaintiffs contend (BIO 29-34) that the decision below "protect[s]" everyone's "legal interest[s]." It does not.

1. Plaintiffs tell the Court (BIO 30-31, 33) not to worry about the absent class members whose rights will be adjudicated in these sprawling class actions: they can be identified and notified through "social media and web communications" inspired by "Silicon Valley [marketing] firms" that aim to "catch[] the

consumer's eye," "permit[ting] … unprecedented level[s] of class involvement."

Plaintiffs' musings about Twitter and Facebook are irrelevant. The Ninth Circuit held that publication "in a periodical" or "at an appropriate physical location" suffices, Pet.App.16a, and Plaintiffs never suggested that they could identify and reach millions of grocery-store shoppers, assuming (against evidence) that those purchasers even remember buying Wesson Oil. The vast majority of plaintiffs in cases like these will never know about the litigation, let alone participate in it.

Plaintiffs' supposedly ideal examples prove as much. "[H]undreds of thousands of class member[s]" (BIO 33 n.28) may have filed claims in *Edwards v. National Milk Producers Federation*, 2014 WL 4643639 (N.D. Cal. Sept. 16, 2014), but at least *45 million* other class members—those who purchased a host of dairy products from 2003 to 2014—did not. *Id.* at *1, *4; *see also Careathers v. Red Bull North America, Inc.*, 2015 U.S. Dist. LEXIS 97533 (S.D.N.Y. May 12, 2015) (everyone who bought one of the billions of cans of Red Bull sold in the United States each year). Unfortunately, classes like these—with triflingly low claims rates, enriching the plaintiffs' bar at absent class members' and defendants' expense—are all too "precedented." *See* Chamber Amicus Br. 21-23.

2. Plaintiffs also tell Conagra (BIO 31, 32) not to worry: the "managerial steps" for the "remedial phases" can be hashed out later, and Conagra's rights won't be "infringed" if "class members file rebuttable affidavits." But Rule 23—whose requirements must be "rigorous[ly] analy[zed]" *before*

certification, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013)—shields defendants against Plaintiffs' certify-first, ask-questions-later approach. For good reason: as this Court recently repeated (but as Plaintiffs ignore), "class certification often leads to a hefty settlement" because a "defendant facing the specter of classwide liability may abandon a meritorious defense." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1713 (2017). Questions about the ease of identifying absent class members cannot be put off until tomorrow, for tomorrow will likely never come.

Moreover, defendants who roll the dice inevitably face the problems that Rule 23 is supposed to prevent. No "managerial steps" can fix classes like these. No one has *ever* identified *any* way besides mini-trials to establish whether *any* claimant really bought Wesson Oil. To protect its interests, then, Conagra will have to litigate every single claim, on individualized grounds not subject to any common proof. Rule 23 does not sanction that result.

Finally, Plaintiffs assert (BIO 3) that defendants like Conagra simply want "to commit wide-scale, but low value, harm to individual consumers with impunity." If Plaintiffs' predictions come true, litigants in their shoes will someday be able to propose feasible methods of identifying class members. Until then, Plaintiffs can't explain why massive, unwieldy class actions—conducted almost entirely for class counsel's benefit—are preferable to requests for injunctive relief, attorney general suits, regulatory action, or other means of policing corporate conduct.

CONCLUSION

The petition should be granted.

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Respectfully submitted,

SHAY DVORETZKY
Counsel of Record
JEFFREY R. JOHNSON
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

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