No. 16-1221

IN THE
Supreme Court of the United States

CONAGRA BRANDS, INC.,
Petitioner,

v.

ROBERT BRISEÑO ET AL.,
Respondent.

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

BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

KATE COMERFORD TODD
WARREN POSTMAN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

ANTON METLITSKY
(*Counsel of Record*)
ametlitsky@omm.com
HANNAH Y.S. CHANOINE
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

Counsel for Amici Curiae

[Additional Counsel Listed Inside Cover]

H. SHERMAN JOYCE
LAUREN S. JARRELL
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W. Suite 400
Washington, D.C. 20036
(202) 682-1163

Counsel for the American Tort Reform Association

JASON ZARROW
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the requirements for class certification.

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil-justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed amicus briefs in cases involving important liability issues.

---

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have granted blanket consent to the filing of amicus briefs, and their consent letters are on file with the Clerk's office. Pursuant to Rule 37.2(a), timely notice was provided to petitioners. Respondents were provided with notice on May 5, 2017, of the intent to file this brief, and have indicated that they do not object to the filing of any timely amicus brief.

Many of *amici*'s members and affiliates are defendants in class actions. Accordingly, they have a keen interest in ensuring that courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification before a class is certified. For the reasons explained below, the "ascertainability" principle—i.e., that class certification is inappropriate unless the plaintiff can demonstrate a reliable and administratively feasible method for identifying who falls within the class of individuals with a claim against the defendant—is critically important to *amici*'s members.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When properly employed, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quotations omitted). Aggregate treatment is only appropriate, however, if the major legal and factual questions in the case can be adjudicated on a classwide basis. If individual issues predominate over common ones, the benefits of class adjudication are lost. Nor can courts simply ignore individualized issues in favor of efficiency or abstract notions of public policy. Class action defendants possess a fundamental due-process right "to present every available defense," *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotation omitted), and if due process requires such defenses to be adjudicated individually, then class treatment is inappropriate.

These fundamental principles lie at the core of the "ascertainability" doctrine. In some cases, including this one, it is simply not practicable to determine on a classwide basis which potential plaintiffs are actually members of the proposed class—i.e., which potential plaintiffs were injured by the defendant's allegedly unlawful conduct. But because Rule 23 cannot give a cause of action to an individual who does not have a valid claim, each plaintiff must prove (and the defendant must be able to test) that she was actually injured by the defendant's conduct and thus has a claim. That is why "ascertainability" requires the named plaintiff to come forward with a reliable and administratively feasible method for identifying absent class members before a class can be certified.

In this way, the doctrine of ascertainability gives effect to Rule 23(b)(3)'s predominance and superiority requirements. Common issues of law and fact cannot predominate when individualized assessments of the very existence of a claim overwhelm common questions. And a class action is not the superior method of adjudication when the question whether each plaintiff has a claim *at all* must be adjudicated in individualized mini-trials rather than on a classwide basis.

In light of these fundamental principles, the Second, Third, Fourth, and Eleventh Circuits have adopted an ascertainability rule. The First, Fifth, and Tenth Circuits, moreover, while not using the "ascertainability" label, similarly reject class actions where individualized determinations are needed to test whether would-be class members were actually injured, i.e., are properly members of the class.

The Sixth, Seventh, and Ninth Circuits, however, reject these principles, and instead certify classes even when the plaintiff cannot prove that there is a reliable and administratively feasible method for identifying absent class members. In these circuits, the courts assume that potential plaintiffs can establish class membership by providing an affidavit swearing that they were injured by the defendant's allegedly unlawful conduct, and that defendants will only be afforded the right to test those affidavits—if ever—as part of a post-certification, claims-administration process.

The trial-by-affidavit solution these three circuits have crafted does not solve the problem—it *demonstrates* the problem. If a class were allowed to proceed on affidavits without allowing the defendant the opportunity to test them, then the defendant would be deprived of the fundamental right to present a defense to the claims against it. And if a defendant *were* allowed to test each claimant's assertion of injury, then allowing classwide adjudication would fail Rule 23's predominance and superiority requirements. The only approach that could be consistent with both due process and Rule 23 is to require the named plaintiffs, at a minimum, to identify a reliable, objective method to test the claims to class membership on a classwide basis.

Nor can a court delay this process until after the class has been certified. As with the affidavit approach, kicking the can down the road past certification is no solution at all. It conflicts with this Court's consistent admonition that class-certification questions must be resolved at the class-certification stage. And it allows certification of class actions

that cannot possibly be adjudicated to final judgment consistent with Rule 23 and, given the inexorable settlement pressure that certification creates, all but assures that defendants will *never* be afforded their due-process right to test the existence of each plaintiff's claim.

The courts of appeals are intractably divided over an important question implicating defendants' due-process rights and the appropriate limits of class adjudication.

The petition should be granted.

ARGUMENT

Rule 23(b) is intended to balance the efficiencies of classwide adjudication with the requirements of due process. A proper application of that Rule and those principles requires plaintiffs to demonstrate as a precondition of class certification that they can prove injury on a classwide basis—i.e., that the class is "ascertainable." The courts of appeals, however, have disagreed over the question whether Rule 23(b) allows class certification absent that showing. The court below, moreover, answered that question incorrectly. The petition should be granted.

I. RULE 23(b)(3) AUTHORIZES CLASS CERTIFICATION ONLY WHERE THERE IS A PRACTICAL METHOD FOR CLASSWIDE ADJUDICATION THAT IS CONSISTENT WITH DUE PROCESS

A. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," and to justify a departure from this ordinary rule, the class plaintiff

bears the burden of showing that classwide adjudication is appropriate. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quotations omitted). Class treatment is appropriate only where the key questions can be resolved "in the same manner [as] to each member of the class," *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979), "[f]or in such cases, 'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.'" *Gen. Tel. Co.*, 457 U.S. at 155 (quoting *Yamasaki*, 442 U.S. at 701).

Rule 23(b) serves two fundamental purposes relevant here. *First*, Rule 23 assures that claims that exhibit the efficiencies described above can proceed through the class vehicle, but that claims that do not exhibit those efficiencies must be litigated individually. When class members' claims cannot be adjudicated on a classwide basis but instead turn on individualized facts, in other words, a putative class action cannot satisfy the requirements of Rule 23, and the class may not be certified. *E.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013).

Second, Rule 23(b) assures that any efficiencies gained from the class vehicle cannot override defendants' due-process rights, including a defendant's right to present defenses to claims against it. Indeed, Rule 23's "procedural protections" are grounded in "due process," *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008), and were carefully crafted to preclude aggregation of claims when doing so would undermine defendants' due-process rights "to present every available defense." *Lindsey*, 405 U.S. at 66 (quotations omitted); *see also* Fed. R. Civ. P. 23(b)(3) advisory

committee's note to 1966 amendment (Rule 23(b)(3) class action cannot be certified where doing so would require "sacrificing procedural fairness"). This Court has thus avoided reading the Rule in a manner that would deprive a defendant of its right "to litigate its … defenses to individual claims," and has instead required that both claims *and defenses* be amenable to classwide adjudication to proceed under Rule 23. *See Dukes*, 564 U.S. at 367.

B. One such defense is that the plaintiff has no claim at all because he or she was never injured by the defendant's allegedly unlawful conduct, and thus is not a member of the alleged class. *See Lewis v. Casey*, 518 U.S. 343, 360 n.7 (1996) ("Courts have no power to presume and remediate harm that has not been established.").

That much is obvious for individual actions. Had this case been brought individually, the plaintiff would have had to offer evidence that he purchased Wesson cooking oil bearing the "100% Natural" label, and the defendant would unquestionably be allowed to challenge the plaintiff's proof. That principle necessarily applies equally to class actions, because "Article III does not give federal courts the power to order relief to any uninjured plaintiff, *class action or not*." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (emphasis added). Indeed, a class action is merely a procedural device "ancillary to the litigation of substantive claims," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980), that "leaves the parties' legal rights and duties intact and the rules of decision unchanged," *Shady Grove Orthopedic Assocs.,*

P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010) (plurality opinion).

It is thus fundamental, under Rule 23 and as a matter of due process, that class defendants be afforded the opportunity to challenge each plaintiff's claim of injury.

II. THE "ASCERTAINABILITY" REQUIREMENT FLOWS DIRECTLY FROM, AND IS COMPELLED BY, RULE 23(b)(3)

There is only one way, consistent with Rule 23 and due process, to give effect to these fundamental principles. As seven circuits have recognized, district courts must assure that named plaintiffs offer, at the class certification stage, a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition (i.e., that they were injured by the challenged conduct). That rule follows directly from Rule 23(b)(3)'s express requirements.

A. "Ascertainability" Protects A Defendant's Right To Challenge Class Membership While Preserving The Benefits of Class Adjudication

The ascertainability rule appropriately preserves class-action efficiencies while protecting defendants' rights to challenge the basis for plaintiffs' assertion that they are members of the class (i.e., that they were injured by the defendant's conduct). To satisfy this rule, a plaintiff must do more than plead a class that is "defined by an objective criterion," Pet. App. 6a; she must show that there is a reliable and administratively feasible mechanism for *determining*

whether class members fall within the class definition. *See, e.g.*, *Leyse v. Lifetime Ent. Servs., LLC*, --- F. App'x ----, 2017 WL 659894, at *2 (2d Cir. Feb. 15, 2017); *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 947-48 (11th Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358-59 (4th Cir. 2014); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013). The plaintiff is *not* required under this standard to "identify all class members at class certification—instead a plaintiff need only show that class members *can* be identified." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (quotations omitted).

By requiring the plaintiff to come forward with a workable and testable method for identifying absent class members, ascertainability assures that the class mechanism does not override a defendant's due-process right to "test the reliability of the evidence submitted to prove class membership." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *see Brecher v. Republic of Argentina*, 806 F.3d 22, 26 (2d Cir. 2015) (class cannot be certified where "determining class membership would require ... individualized mini-hearings"); *Karhu*, 621 F. App'x at 948-49 (same).

B. "Ascertainability" Is Simply A Specific Application Of The Predominance And Superiority Requirements Of Rule 23(b)(3)

While the ascertainability rule protects important due-process principles, it is in the end simply a specific application of the express provisions of Rule 23(b)(3)—which, as explained, is itself intended to safeguard those same principles.

Rule 23(b)(3) requires the plaintiff to show, at the class-certification stage, "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). A plaintiff cannot satisfy this burden without offering an administrable method of identifying would-be class members.

1. The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997), and ensures that class adjudication "achieve[s] economies of time, effort, and expense," Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment. And it is axiomatic that predominance is not satisfied, and a class cannot be certified, where each plaintiff's claim requires individual treatment. *See, e.g.*, Charles A. Wright et al., 7AA *Federal Practice & Procedure* § 1778 (3d ed. 2017). A plaintiff at class certification must accordingly demonstrate that its claim is "capable of proof at trial through evidence that [is] common to the class rather than individual to its members." *Behrend*, 133 S. Ct. at 1430.

A plaintiff cannot satisfy predominance without offering an administratively feasible method for identifying absent class members, because otherwise, the only way to test each plaintiff's claim to class membership would be to conduct a series of individualized mini-trials as to whether each plaintiff has a claim in the first place. A plaintiff-by-plaintiff sideshow dedicated to determining who bought the prod-

uct in question would so overwhelm any common questions that the benefits of class adjudication would be "lost and the need for judicial supervision and the risk of confusion … magnified." Wright, *supra*, § 1778.

Ascertainability is thus nothing more than a specific application of predominance that focuses on the injury element of the plaintiffs' claim, i.e., whether each plaintiff was in fact subject to the allegedly unlawful practice. It ensures that the most basic question in class litigation—have the class members suffered an injury?—is capable of generating a "common *answer[]*." *Dukes*, 564 U.S. at 350 (quotations omitted).

2. Ascertainability also gives effect to Rule 23's superiority requirement, i.e., that a class action represents the best available method "for fairly and efficiently adjudicating the controversy," with a view toward "the likely difficulties in managing" the action as a class action. Fed. R. Civ. P. 23(b)(3). A class without identifiable class members is hardly superior to individual litigation because where "injury determinations must be made on an individual basis …, adjudicating the claims as a class will not reduce litigation or save scarce judicial resources." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001); *see In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) ("When a case turns on individualized proof of injury, separate trials are in order.").

3. The court below rejected these principles. The court stated that "Rule 23's enumerated criteria

already address the interests that motivate[]" the ascertainability rule, Pet. App. 12a, but then rejected the existence of an ascertainability requirement. What's more, the court issued a separate, unpublished opinion purporting to apply Rule 23, but did not even address plaintiff's inability to identify absent class members, let alone explain how that failure could be consistent with Rule 23. *See* Pet. App. 34a-39a.

A proper application of predominance and superiority would have required the court to recognize an ascertainability rule, and deny class certification. The proposed class is not ascertainable because it is undisputed that plaintiffs have offered no administratively feasible way to ensure that each would-be class member actually purchased Wesson cooking oil bearing the "100% Natural" label. *See* Pet. 23-25. The class thus fails predominance because determining who actually bought the product would necessarily require individualized mini-trials. And it fails superiority because determining the identity of absent class members, consistent with defendant's due-process rights, would be an impossible judicial task.

C. The First, Fifth, And Tenth Circuits Apply An Ascertainability Rule As Part Of The Predominance And Superiority Analysis

Petitioner has correctly identified an express conflict between the Second, Third, Fourth, and Eleventh Circuits (which have adopted an ascertainability rule), and the Sixth, Seventh, and Ninth Circuits, which have rejected that rule. Pet. 10-19. Beyond this express conflict, the divide among the cir-

cuits is in substance even broader, because the First, Fifth, and Tenth Circuits, without using the label "ascertainability," deny class certification on predominance or superiority grounds when the plaintiff cannot demonstrate an administratively feasible method for classwide determination of whether each plaintiff has a claim. The class in this case could not be certified under these precedents.

The Fifth Circuit denies certification on predominance grounds where the plaintiff "fail[s] to advance a viable theory of generalized proof to identify those persons, if any, to whom [the defendant] may be liable." *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 329 (5th Cir. 2008). In *Gene & Gene*, the Fifth Circuit reversed the district court's certification of a class of recipients of unsolicited fax messages asserting claims under the Telephone Consumer Protection Act, where there was no objective evidence that "consistently or accurately reflect[ed] whether a given recipient had consented to receive fax advertisements." *Id.* at 328. Absent "any viable theory employing generalized proof concerning the lack of consent," the court held, "myriad mini-trials [could not] be avoided," and the individualized question of who was properly in the class foreclosed a showing of predominance. *Id.* at 329; *see also, e.g.*, *Ticknor v. Rouse's Enters., L.L.C.*, 592 F. App'x 276 (5th Cir. 2014) (denying certification of class action under Fair and Accurate Credit Transactions Act on similar grounds).

The same is true in the Tenth Circuit, which has held that a class fails predominance and superiority where the district court "would have to engage in a significant amount of work simply to identify the

purported class members." *Quinn v. Nationwide Ins. Co.*, 281 F. App'x 771, 777 (10th Cir. 2008) (affirming district court's denial of class certification on predominance and superiority grounds where "class members [were] impossible to identify prior to individualized fact-finding").

Finally, the First Circuit has applied the ascertainability rule under the banner of predominance, explaining that the plaintiff must "establish, without need for individual determinations for the many millions of potential class members, which consumers were impacted by the [defendant's conduct] and which were not." *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) (vacating class certification order for consideration of whether such classwide proof existed).

These decisions demonstrate not only that the ascertainability requirement derives directly from the express provisions of Rule 23(b)(3), but also that the decisional conflict as to the question presented is in substance broader even than the 4-3 split identified in the petition. Particularly given the forum-shopping opportunities inherent in nationwide class actions, *see* Pet. 20-23, this circuit conflict is intolerable, and only this Court can resolve it. Certiorari should be granted.

III. TRIAL BY AFFIDAVIT AND CLAIMS-ADMINISTRATOR MINI-TRIALS ARE NOT LEGITIMATE SUBSTITUTES FOR PROPER ASCERTAINABILITY

The Ninth Circuit's apparent solution to unidentifiable class members was to relax the requirements of proof and delay consideration of the issue until af-

ter certification. Neither proposal adequately safeguards a defendant's due-process rights, and each fails to give effect to the requirements of Rule 23(b)(3).

A. Trial By Affidavit, Without More, Cannot Adequately Safeguard A Defendant's Right To Challenge Class Membership

The court below held that the concerns motivating the ascertainability rule can be addressed by allowing absent class members to self-identify through affidavits in which the potential class member simply asserts that he or she is in fact a member of the class (for example, by asserting that she purchased the offending product). The Ninth Circuit's trial-by-affidavit approach ignores defendants' due-process rights and violates Rule 23.

The Ninth Circuit justified its affidavit approach on the ground that "a consumer's affidavit could force a liability determination at trial without offending the Due Process Clause." Pet. App. 23a. But that would only be true if the defendant were allowed to *challenge* a consumer's affidavit before that liability determination is made. And that is why the Ninth Circuit's proposed solution fails: due process requires that the defendant be allowed the opportunity to challenge the veracity of a consumer's affidavit, yet there is no way to afford the defendant that due-process right classwide—it can only be done through a series of mini-trials inconsistent with the class mechanism. *E.g.*, *Karhu*, 621 F. App'x at 948-49; *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012). Thus, "[c]ourts have rejected proposals to employ class member affidavits and sworn

questionnaires as substitutes for traditional individualized proofs" precisely because such submissions are "not subject to cross-examination." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8.6 (12th ed. 2015).

The right to challenge such affidavits is acutely important in cases involving small (or merely technical) injuries, such as in the context of low-cost consumer goods. Oftentimes, the goods at issue are sold in packaging nearly identical to the packaging of lookalike competitors, or there may be brand extensions by the same manufacturer, with important but subtle differences between the two products. Uncorroborated affidavits are especially unreliable in this context because putative class members often will have difficulty accurately recalling their purchases years after the fact.

This case demonstrates the point. No one can reasonably be expected to remember a purchase of Wesson cooking oil with a "100% Natural" label ten years (but not eleven) after the fact, *see* Pet. 5-7, let alone how many bottles they bought within that period. Or consider the following examples:

- In *Bruton v. Gerber Products Co.*, consumers were asked to recall baby food purchases—but only those from specific brand extensions, and of those, only specific flavors, and of those, only the products sold in two particular packaging formats. 2014 WL 2860995 (N.D. Cal. June 23, 2014).[2]

[2] *Bruton*, which denied certification on ascertainability grounds, was reversed by the Ninth Circuit on the authority of

- In *True v. Conagra Foods, Inc.*, consumers were asked to recount purchases of frozen food—but only those sold in the 7-ounce single serving frozen size, and of those, only those with "P-9" or "Est. 1059" printed on the side of the package. 2011 WL 176037 (W.D. Mo. Jan. 4, 2011).

- In *In re Phenylpropanolamine (PPA) Products Liability Litigation*, consumers were asked to recall purchases of over-the-counter products containing the ingredient phenylpropanolamine–but not those containing pseudoephedrine. 214 F.R.D. 614 (W.D. Wash. 2003).

As these cases demonstrate, defendants often will have a strong defense to any particular would-be class member's uncorroborated claim of membership. But teeing up that defense through discovery and cross examination of hundreds of thousands of class members would eliminate the efficiencies of class-wide adjudication.

This is not to say that, in small-dollar class actions like this one, plaintiffs will have a large incentive to fabricate claims, although that incentive will certainly exist in some cases. But the "vagaries of memory" present the more pressing concern, including the pronounced risk of mistake inevitable with a claims process that invites class members to speculate about precisely which bottle of cooking oil or jar

---

the decision below. *See Bruton v. Gerber Prods. Co.*, 2017 WL 1396221, at *1 (9th Cir. Apr. 19, 2017).

of baby food (and how many) they bought years earlier. *In re Phenylpropanolamine*, 214 F.R.D. at 617; *see also Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726, at *10 (N.D. Cal. June 13, 2014) ("Even assuming that all proposed class members would be honest, it is hard to imagine that they would be able to remember which particular Hunt's products they purchased from 2008 to the present, and whether those products bore the challenged label statements.").

At its core, that is what the ascertainability rule is all about. It ensures that a would-be plaintiff's claim to recovery is based on something more than "speculation or guesswork," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969), and that courts do not paper over glaring defects in the possibility of classwide treatment consistent with the requirements of due process and Rule 23.

B. Resolving Problems Of Ascertainability Cannot Be Deferred Until After The Class Has Been Certified Or Farmed Out To Claims Administrators

1. Some courts, including the court below, have held that district courts may defer any assessment of a plaintiff's method for identifying absent class members until *after* the class is certified—in these circuits, it is enough that the defendant is able to challenge the named plaintiff's proof at the certification stage. Pet. App. 21a-22a; *see also Mullins v. Direct Digital, LLC*, 795 F.3d 654, 664 (7th Cir. 2015). That approach is inconsistent with Rule 23 and this Court's precedents in two respects.

First, this Court has made clear that key questions concerning class certification must be resolved *before* a class is certified. Accordingly, the Court has mandated that "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23" at the certification stage, and that courts "conduct a 'rigorous analysis' to determine whether" he has met that burden. *Behrend*, 133 S. Ct. at 1432-33 (quoting *Dukes*, 564 U.S. at 350-51). It is not enough for a plaintiff merely to *allege* that absent class members can be identified in an administratively feasible manner, because "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class" can be certified. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014).

Second, and equally important, a defendant cannot meaningfully test the validity of absent class members' claims to membership once a class is certified—unless certification issues are addressed at the certification stage, they will likely never be addressed at all. As this Court has recognized on numerous occasions, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord 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.").

This is why nearly all cases, once certified as class actions, end in settlement. Because "the certifi-

cation decision is typically a game-changer, often the whole ballgame," for plaintiffs and defendants alike, *Marcus*, 687 F.3d at 591 n.2, the certification stage is the defendant's only real opportunity to test the plaintiff's assertion that an identifiable class exists—i.e., that each plaintiff that seeks a recovery against the defendant actually has a claim.

2. The response appears to be that the defendant will be able to test each plaintiff's proof of injury, if ever, "[a]t the claims administration stage" before claims administrators, not a jury or Article III judge. Pet. App. 21a; *see also Mullins*, 795 F.3d at 667-68. That solution does not solve any of the due-process or Rule 23 problems just described, because it does not require this showing to be made as a prerequisite to class certification. Notably, the claims-administration suggestion derives from the Seventh Circuit's opinion in *Mullins*, Pet. App. 18a, which cites sources supporting claims-administration in the class *settlement* context, *Mullins*, 795 F.3d at 667-68 (citing *Manual for Complex Litigation* § 21.66-661 (4th ed. 2004), and 3 William B. Rubenstein et al., *Newberg on Class Actions* § 12:20 (5th ed. 2013))—in which the defendant *waives* the right to a jury or Article III adjudication in exchange for a discount on the potential liability claimed by the plaintiff.

The question here, however, arises only in the context of a litigated class action. It should be obvious that depriving a defendant of a jury or Article III adjudication of whether a plaintiff was injured by the defendant's conduct only exacerbates the Rule 23 and due-process problems described above, and certainly does not solve them. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (jury-trial right applies in

class actions); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (a district court's reliance on a non-Article III entity to adjudicate fundamental issues amounts to "an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation").

C. Policy Considerations Do Not Support Certifying A Class Where Its Members Cannot Feasibly Be Identified

Objections to the ascertainability rule appear to be driven in large part by the worry that it may foreclose individual redress in cases involving low-value individual claims. *See* Pet. App. 39a. But maintaining a robust ascertainability rule (i.e., rigorously enforcing predominance and superiority) will not—and has not—spelled the end of the class action. These concerns are also not well founded, and certainly cannot justify jettisoning due-process and Rule 23 protections.

The premise that certification of class actions involving low-cost consumer goods will benefit absent class members is dubious at best. As Congress found a decade ago, "[c]lass members often receive little or no benefit from class actions and are sometimes harmed." Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 2(a)(3), 119 Stat. 4 (2005). Even the court below recognized the "consistently low participation rates in consumer class actions," Pet. App. 18a, which, experience shows, are *far* lower in class actions where class members are not readily identifiable and thus direct notice is legally impossible, *see* Decl. of Deborah McComb ¶ 5, *Poertner v. Gillette Co.*, No. 6:12-cv-00803 (M.D. Fla. Apr. 22, 2014)

(ECF No. 156) (settlement administrator attesting to median claims rate of .023% in classes involving "little or no direct mail notice"—i.e., *99.9%* of class members received no benefit at all).[3]

Indeed, a recent study conducted at the request of *amicus* the Chamber's Institute of Legal Reform—in which a team of lawyers undertook an empirical analysis of consumer and employee class actions in federal court in 2009—found that of the six cases in the data set for which settlement distribution data was public, "five delivered funds to only miniscule percentages of the class: 0.000006%, .033%, 1.5%, 9.66%, and 12%."[4] According to that data, *at best* 88% of class members received no benefit, and absent class members are even less likely to make a claim where direct notice is not possible.

But while data suggest that difficult-to-identify class members are not seeing the benefits of class certification, there is no doubt who is. Plaintiffs' lawyers are handsomely rewarded for class-action settlements, "[s]ince attorneys' fees in class actions

---

[3] *Available at* http://blogs.reuters.com/alison-frankel/files/2014/05/duracellclassaction-mccombdeclaration.pdf.

[4] Mayer Brown LLP, *Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions* 2 (Dec. 11, 2013), *available at* https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

The sixth case was an outlier stemming from the Bernie Madoff Ponzi Scheme, where "each class member's individual claim was worth, on average, over $2.5 million," *id.* at 10-11, thus distinguishing the case from the small-dollar consumer class actions discussed here.

are often calculated as a percentage of the recovery." Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 122 (2014). And defense lawyers generate massive fees, as businesses subject to large class actions are forced to spend immense amounts of money on defense costs, which can soar into the tens of millions of dollars. *See, e.g.*, *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015) (noting that in 75% of bet-the-company class actions, "the cost of outside counsel exceeds $5 million per year per case").[5]

The ripple effects of these lawsuits are felt throughout the economy, harming businesses *and consumers* alike. Litigation costs and settlement payouts are ultimately passed along, at least in part, to consumers in the form of higher prices, to employees in the form of lower wages, and to investors in the form of lower returns. The irony of all this is that these attempts to save low-value claims only make it more difficult to deliver low-priced goods.

In any event, policy arguments provide no excuse for relaxing the requirements of Rule 23. As this Court has stressed, "policy arguments" about "the desirability of the small-claim class action" are best addressed to the Legislature, not the courts, *Coopers*, 437 U.S. at 470, and Rule 23's "stringent requirements" cannot be "dispensed with" based on the "prohibitively high cost of compliance," *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304,

---

[5] *Available at* http://classactionsurvey.com/pdf/2015-class-action-survey.pdf.

2309 (2013) (quotations omitted), especially where those requirements safeguard due-process rights.

CONCLUSION

For all these reasons, as well as those presented in the petition for certiorari, the petition should be granted.

Respectfully submitted,

KATE COMERFORD TODD
WARREN POSTMAN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

ANTON METLITSKY
(*Counsel of Record*)
ametlitsky@omm.com
HANNAH Y.S. CHANOINE
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

Counsel for Amici Curiae

H. SHERMAN JOYCE
LAUREN S. JARRELL
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W. Suite 400
Washington, D.C. 20036
(202) 682-1163

Counsel for the American Tort Reform Association

JASON ZARROW
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amici Curiae