No. 15-549

In the

Supreme Court of the United States

DIRECT DIGITAL, LLC,

Petitioner,

v.

VINCE MULLINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It directly represents 300,000 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. See http://www.chamberlitigation.com/cases/issue/class-actions.

Many members of the Chamber may find themselves named as targets of class action lawsuits. Accordingly, they have a keen interest in ensuring that courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification before certifying a class. One such requirement is ascertainability, which ensures that there is an administratively feasible method by which class

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[1] No counsel for either party wrote this brief in whole or in part, and no counsel or party other than Amicus, its counsel, and its members has made a monetary contribution intended to fund the brief's preparation or submission. The parties' consents to the filing of *amicus* briefs are on file with the Clerk's office.

members can be identified without (1) depriving the defendant of its due process rights or (2) requiring the level of individualized proof inconsistent with the class action procedure.

The court below applied what it called a "weak ascertainability" standard to hold that, at the certification stage, a class is adequately defined if its scope is, as a theoretical matter, based on objective criteria. This ascertainability standard can be met even if there is no reliable and administratively feasible method of proving or challenging who, as a factual matter, is in the class. Such an approach ignores this Court's requirement that courts apply a "rigorous analysis" of proposed class actions, undermines defendants' due process rights, and would exacerbate a trend of abusive class actions that are brought solely in the hopes of pressuring a settlement that benefits primarily the attorneys in the suit. The fallout of such abuse will harm businesses across this country. The Chamber and its members therefore have a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

For any class action to be litigated to judgment, the court must identify a workable method to determine which individuals, from among all of those putatively represented, are authentically members of the class. This is the issue of ascertainability, which addresses the process by which claims of class membership are evaluated.

All circuits agree that every class action must confront the issue of ascertainability at some point. However, the circuit courts disagree over the *timing* of this process.

The standard employed by the Seventh Circuit, and subsequently adopted by the Sixth Circuit, finds ascertainability adequately satisfied at the class certification stage if there is a clear and objective class definition merely as a *theoretical* matter.

By failing to ensure at the class certification stage that the class is actually ascertainable as a *practical* matter, this "'weak' version of ascertainability" allows certification of class actions that cannot be litigated in adminstrable manner, consistent with due process.

This approach leaves businesses that manufacture and sell low-value consumer goods particularly vulnerable. Unless consumers have saved their receipts and packaging, establishing class membership will hinge on eliciting and testing the recollection of each class member about a particular purchase, sometimes made years ago. Where no evidence is available to corroborate class members' claims of entitlement, the only method for ascertaining members that comports with due process is to permit thousands of mini-trials to test the accuracy of the purported class members' claims. Yet this would render class adjudication completely unworkable.

The Seventh Circuit's willingness to all an unworkable class to proceed past certification is at odds with this Court's mandate of a "rigorous

analysis" for class certification. Such a requirement is critical given the high stakes of class certification, which creates immense economic pressure for a defendant to settle, even in the face of claims that are weak on the merits.

By failing to exercise the gatekeeping function required by Rule 23, the approach of the Seventh Circuit invites further growth in the already growing trend of abusive class actions that pursue claims on behalf of consumers who will never be identified, and thus never benefit from any judgment. Rather than providing a remedy to consumers, such suits enrich primarily plaintiffs' lawyers, with the expense to businesses being passed on to consumers, employees, and investors.

Review by this Court is urgently needed not only to resolve the split of authority identified by Petitioner, but also to address this troubling trend of nuisance class actions.

ARGUMENT

As detailed by Petitioner, the decision below created a clear split with the Third and Eleventh Circuits, conflicts with this Court's precedents, and calls out for immediate review. The Chamber submits this brief to underscore how the Seventh Circuit's approach ignores the practical realities of class action litigation and the constraints of due process, flouts this Court's requirement of a "rigorous analysis" before class action certification, and invites abusive lawsuits that help no one but plaintiffs' lawyers.

A. The Seventh Circuit's Approach Allows Certification of Class Actions That Cannot Be Litigated In An Administrable Manner Consistent With Due Process.

The Seventh Circuit below adopted a standard it described as the "'weak' version of ascertainability." *Mullins v. Direct Digital,* 795 F.3d 654, 659 (7th Cir. 2015) (Pet. App. 7a).[2] Under this relaxed test, a court may certify a class without first confirming that there is a workable method by which class members can be ascertained from among the group of individuals seeking a share of the funds. *Mullins*, 795 F.3d at 662 (Pet. App. 13a-14a). This weak test finds ascertainability satisfied if there is merely a clear and objective class definition. *Id.*

That approach necessarily countenances certification of class actions that are either (a) entirely inadministrable or (b) work a complete deprivation of the defendant's due process right to present every available defense. This risk is particularly high in cases involving low-cost consumer goods. These items are often sold by independent retailers in brick-and-mortar locations, leaving the manufacturer-defendant with no records of individual purchases.

Proving class membership in cases like this accordingly requires a highly individual showing

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[2] This test has since been adopted by the Sixth Circuit in *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015) (citing *Mullins*).

based on evidence that is inherently contestable. Oftentimes, the goods at issue are sold in packaging nearly identical to the packaging of lookalike competitors. There are often brand extensions by the same manufacturer, with minor flavoring or ingredient changes from variety to variety of the same item. Where consumers have not saved their receipts or packaging for such items, establishing class membership will normally depend on eliciting, *and testing,* the recollection of potential class members regarding a particular purchase, often a small purchase made long ago.

To take just a few examples:

- In *In re Phenylpropanolamine (PPA) Products Liability Litigation*, claimants were asked to recall purchases of over-the-counter products containing the ingredient phenylpropanolamine–but not those containing pseudoephedrine. 214 F.R.D. 614, 618-19 (W.D. Wash. 2003).

- 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. No. 07-00770-CV-W-DW, 2011 U.S. Dist. LEXIS 6770, *16 (W.D. Mo. Jan. 4, 2011).

- In *Algarin v. Maybelline, LLC*, claimants were called on to identify Maybelline makeup purchases—but only from the SuperStay 24 Hr-brand of lip colors and

foundation. 300 F.R.D. 444, 455 (S.D. Cal. 2014).

- In *Bruton v. Gerber Prods. Co.,* claimants 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 only two packaging formats. No. 12-CV-02412-LHK, 2014 U.S. Dist. LEXIS 86581, *13-14 (N.D. Cal. June 23, 2014).

- In *Jones v. ConAgra Foods, Inc.*, claimants were asked to recall purchases of Hunt's canned tomato products—but only those with labels bearing the words "100% Natural" or "Free of artificial ingredients & preservatives." No. C 12-01633 CRB, 2014 U.S. Dist. LEXIS 81292, *31-33 (N.D. Cal. June 13, 2014).

- In *Rahman v. Mott's*, claimants were asked to recall purchases of apple juice—but only the 100% Apple Juice bearing "No Sugar Added" on the label. No. 13-cv-03482-SI, 2014 U.S. Dist. LEXIS 167744, *8 (N.D. Cal. Dec. 3, 2014).

In individual litigation, such issues would be resolved through a plaintiff's testimony, with cross-examination providing a critical test and an

individual's bare, self-serving affidavit would not suffice.[3]

Yet such an approach would be patently unworkable in a large class action. The *True* case, for example, involved sales of an estimated 165,000,000 pot pies, and each potential class member would be asked to identify whether "P-9" or "Est. 1059" appeared on the side of the packaging. 2011 U.S. Dist. LEXIS at *6.

Accordingly, in attempting to secure certification of such a class, plaintiffs' counsel tend to urge a procedure that simply cuts out defendants' ability to test self-serving declarations regarding class membership. For instance, in *PPA Products Liability Litigation*, plaintiffs suggested that potential class members could "submit a certified oath or verification attesting to purchase and possession" and that this would be adequate so long as "checks for fraud exist[ed] at the claims processing stage." 214 F.R.D. at 617.[4]

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[3] The court below noted that all causes of action except treason can be proved by a single affidavit. *Mullins*, 795 F.3d at 669 (Pet. App. 29a-30a). But the defendant in such cases is still permitted the *opportunity* to cross-examine the affiant and to present defenses specific to that individual.

[4] The court denied certification without assessing the adequacy of the proposed fraud-detection system, yet it is difficult to imagine any procedure that could meaningfully weed out fraud based on claimants' say-so. *PPA*, 214 F.R.D. at 617-18.

However, due process requires not only that a plaintiff prove every element of the claim, but also that a defendant be given "an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotes omitted); *see also, e.g., United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (recognizing that the "right to litigate the issues raised" in a case is "guaranteed . . . by the Due Process Clause"); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (The "fundamental requisite of due process of law is the opportunity to be heard.") (citations omitted). More specifically, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

Obviously, this due process right applies even in cases proceeding under Rule 23. The 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); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged"); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (quotation marks omitted); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997)) ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act").

For instance, in *Dukes*, this Court emphasized that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2561 (2011). For the same reason, the Third Circuit held in *Carrera* that "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." 727 F.3d at 307; *see also Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) ("The Rules Enabling Act * * * and due process * * * prevent[] the use of class actions from abridging the substantive rights of any party.").

B. Allowing Certification Of Inadministrable Class Actions Conflicts With The Requirement That Courts Apply A Rigorous Analysis And Invites Nuisance Suits.

This Court has emphasized that district courts apply a "rigorous analysis" at the certification stage to ensure that a class is certified only if "all [of a proposed class's] claims can productively be litigated at once." *See Wal-Mart*, 131 S. Ct. at 2551. "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.* This analysis is particularly important given that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon

a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

Requiring that a class be administratively and objectively identifiable is not only critical to this "rigorous analysis," but also serves the "practical purpose of preventing a plaintiff with a largely groundless claim from taking up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Bell Atlantic v. Twombly*, 550 U.S. 554, 557 (2007) (internal quotes omitted).

In *Ashcroft v. Iqbal* and *Bell Atlantic v. Twombly*, this Court explained that even under the "short and plain statement" pleading standard of Rule 8—a more *lenient* standard than at the class certification stage—plaintiffs must do more than simply parrot the elements of a claim; they must allege sufficient facts for the court to determine that the claim is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.") (internal quotes omitted); *Twombly*, 550 U.S. at 558 ("[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.") (quotation omitted).

A meaningful ascertainability requirement serves this same function. Under this view of ascertainability, class representatives must do more than simply parrot the class definition; prior to class certification, they must provide information for the

court to determine that class membership will be readily ascertainable in a manner that is both reliable and administratively feasible while preserving the efficiencies of the class action process. *Carrera v. Bayer Corp.,* 727 F.3d 300, 306 (3d Cir. 2013); *see also Hayes v. Wal-Mart Stores, Inc.,* 725 F.3d 349, 355 (3d Cir. 2013); *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012).

This Court's rationale in *Iqbal* and *Twombly* applies with even greater force in the class certification context because Rule 23 "does not set forth a mere pleading standard." *Dukes*, 131 S. Ct. at 2551. Instead, because class actions are an "exception to the usual rule" that cases are litigated individually, "certification is proper only if the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied." *Dukes*, 131 S. Ct. at 2550-51 (internal quotes omitted and emphasis added).

The Seventh Circuit's opinion below responded to Petitioner's invocation of this rigorous ascertainability approach by suggesting that a defendant will *eventually* be given the opportunity to challenge ascertainability after class certification. *E.g., Mullins*, 795 F.3d 654, 673 (Pet. App. 36a):

> [A] district judge has discretion to (and we think normally should) wait and see how serious the problem may turn out to be after settlement or judgment, when much more may be known about available records, response rates, and other relevant factors. And if a

> problem is truly insoluble, the court may decertify the class at a later stage of the litigation.

Mullins, 795 F.3d at 664 (Pet. App. 18a-19a). But that is no response at all.

A central function of the "rigorous analysis" required under Rule 23 is to prevent defendants from having to proceed past class certification where there is a very real chance that the class will later be decertified. This safeguard is of critical importance to defendants because, once a class is certified, few defendants can afford to wait until "after settlement or judgment" to re-litigate the propriety of the original certification. It is no secret that class actions are a "powerful tool" that "can give a class attorney unbounded leverage . . . ." S. Rep. No. 109-14, at 20 (2005) (Class Action Fairness Act); *id.* (discussing "frivolous lawsuits" that "essentially force corporate defendants to pay ransom to class attorneys by settling").

As this Court has repeatedly recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a

small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

The stakes of a class action, once it has been certified, immediately become so great that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial . . . ." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975).

Accordingly, even the most legally surefooted class-action defendant may capitulate to what Judge Friendly aptly termed "blackmail settlements" that provide a windfall to plaintiffs and, ultimately, the plaintiffs' class-action bar. Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); *see also* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 812 (Dec. 2010) ("virtually all cases certified as class actions and not dismissed before trial end in settlement"). There can be little mystery, then, why class counsel is often so determined to forestall any analysis of ascertainability until after class certification.

And class counsel's reluctance cannot be justified by the burden of the task. Developing a plan for ascertainment does not require counsel to actually identify all authentic class members or provide notice to the public. Instead, the ascertainability test asks that counsel identify a valid, workable *process* for identifying authentic class members. That process is ultimately unavoidable if the case is to proceed, and if it cannot be identified, there is no

legitimate purpose to certifying a class that cannot be adjudicated on a representative basis.

In truth, delaying disclosure of the ascertainment plan is entirely about creating leverage for settlement. If the class is certified before the class counsel is required to show a feasible method of ascertainability, the pressure to settle will be almost unavoidable. As the Third Circuit put it, "As a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs' counsel." *Marcus*, 687 F.3d at 591 n.2. And the ripple effects of these lawsuits and settlements are felt throughout the economy, with the costs being born passed along to innocent customers as higher prices, employees as lower wages and benefits, and investors as dampened returns.

C. Unwarranted Certification of Publication-Only Class Actions Harms Businesses and Consumers Alike, And Benefits Only Plaintiffs' Lawyers.

Almost without exception, cases involving doubtful ascertainability will require publication notice, rather than direct notice by mail or email. As a percentage of the theoretical size of the entire class, claims rates in publication-only class actions are notoriously low.

In connection with the settlement of a class action involving purchasers of Duracell batteries, a senior consultant at Kurtzman Carson Consultants ("KCC"), a settlement administrator, explained that based on "hundreds of class settlements, it is KCC's

experience that consumer class action settlements with little or no direct mail notice *will almost always have a claims rate of less than one percent (1%)*." *See* Decl. of Deborah McComb 5, Dkt. No. 156, *Poertner v. Gillette Co.*, No. 6:12-cv-00803 (M.D. Fla. Apr. 22, 2014) (emphasis added), available at http://blogs.reuters.com/alison-frankel/files/2014/05/duracellclassaction-mccombdeclaration.pdf.

The settlements reviewed by KCC involved products "such as toothpaste, children's clothing, heating pads, gift cards, an over-the-counter medication, a snack food, a weight loss supplement and sunglasses." *Id.* In other words, approximately 99.98% of theoretical class members received no benefit at all.

Given these low response rates, it may be tempting to wonder what the fuss is all about. Doesn't a low rate show that these low-ascertainability cases are not that dangerous after all? No.

First, many class actions are handled as "common fund" cases, in which the defendant is required to pay a sum based on the theoretical size of the class and not based on the number of actual claimants. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (rejecting argument that attorney's fee calculation should exclude unclaimed amounts in the common fund). Following distribution, unclaimed funds are generally distributed to *cy pres* organizations, or occasionally escheat back to the state. *See* Boies & Keith, *Class Action Settlement*

Residue and Cy Pres Awards: Emerging Problems and Practical Solutions (2014), available at http://www.vjspl.org/wp-content/uploads/2014/03/3.25.14-Cy-Pres-Awards_STE_PP.pdf, at 269.

Where class members cannot be identified, *cy pres* funds are generally not reimbursed back to the defendant. *See* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 100 (2014) ("*Cy pres* remedies are an increasingly common feature in class action settlements. Although in the Facebook case no effort was made to pay even a portion of the settlement fund to the absent class members, more commonly courts use *cy pres* to distribute monies that remain unclaimed following efforts to pay class members their respective shares.")

For defendants in such cases, a low claims rate does not affect the amount paid by the company. Second, in common fund cases, class counsel is often permitted to access a percentage of the fund as attorney fees, even when the counsel's lodestar amount might be far lower. *Id.* at 122 ("Since attorneys' fees in class actions are often calculated as a percentage of the recovery, class counsel benefits if the overall recovery is large regardless of whether class members actually receive it.").

The economics here are obvious: enormous consumer class actions operate as wealth transfer mechanisms from defendants to class counsel and their *cy pres*. Rarely do class members benefit in any meaningful way. In a recent study conducted at

the request of the Chamber's Institute for Legal Reform, a team of lawyers undertook an empirical analysis of 148 consumer and employee class actions filed in or removed to federal court in 2009. *See* Mayer Brown LLP, *Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions* (Dec. 11, 2013), available at http://www.instituteforlegalreform.com/resource/do-class-actions-benefit-class-members/.

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%, 0.33%, 1.5%, 9.66%, and 12%." *Id.* at 2 (emphasis omitted). The sixth was a highly unusual outlier involving claims about the Bernie Madoff Ponzi scheme, where "each class member's individual claim was worth, on average, over $2.5 million"—leading to a claims rate of almost 99%. *Id.* at 10 & n.20. And in an unascertainable class for which direct notice to absent class members is impossible, the distribution percentages are likely to be even lower, as indicated by KCC's data.

Yet, as described above, the consequences for the defendants include real-world impacts on prices, jobs, and investor returns.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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