16-1133(L), 16-1425(XAP)

United States Court of Appeals

for the

Second Circuit

MARK LEYSE, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

– v. –

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE *AMICUS 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 standing and class certification.

The Chamber accordingly has a strong interest in the resolution of this case, which implicates both those issues. The district court's decision conflates injury-in-law with injury-in-fact, and effectively holds that a plaintiff need not plead or prove a concrete harm so long as Congress provides a cause of action. This holding is of grave concern to the business community. As this case illustrates, technical violations of regulatory statutes are often alleged by people who are not injured by them. Allowing such claims to proceed in court not only exceeds the constitutional role of federal courts, but also invites abusive, lawyer-driven

[1] Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

litigation in which uninjured plaintiffs strain to identify technical statutory violations in the hopes that the costs and risks of litigation will cause businesses to settle claims brought on behalf of class members who have often suffered no actual harm and will receive no benefit.

The risk of such abusive lawsuits is further heightened if courts fail to enforce Rule 23's limits on class certification. One of those limits is the "ascertainability" principle, which holds that a plaintiff cannot satisfy Rule 23's predominance and superiority requirements without demonstrating a reliable and administratively feasible method for identifying who falls within the class of individuals with a claim against the defendant. Because many of the Chamber's members and affiliates are targets for class actions alleging statutory violations in the absence of injury, the Chamber has a keen interest in ensuring that courts rigorously apply Rule 23's ascertainability principle.

INTRODUCTION AND SUMMARY OF ARGUMENT

A plaintiff cannot state a case or controversy under Article III without first establishing that she has standing to sue. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). The Supreme Court has explained that "the irreducible constitutional minimum of standing contains three elements": (i) that the plaintiff suffered an injury-in-fact; (ii) causation; and (iii) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Most important here is the injury-in-fact

requirement, which ensures "that the legal questions presented to the court will be resolved … in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

As the Supreme Court has recently confirmed, a plaintiff cannot satisfy that requirement merely by alleging an unadorned statutory violation. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016). Rather, the plaintiff must plead (and ultimately prove) not only an invasion of a legal right but *also* that the plaintiff suffered a concrete and particularized harm as a result. *Id.* That is, the plaintiff must show that she suffered a distinct injury whose consequences were felt in the real world—the injury must "actually exist." *Id*. at 1548.

Plaintiff's claimed injury in this case runs headlong into this settled jurisprudence. Plaintiff's sole allegation of injury is that he listened to a prerecorded message concerning a change in cable programming on his roommate's answering machine or voicemail, which he alleges was left in violation of the Telephone Consumer Protection Act (TCPA). But that is nothing more than "a bare procedural violation, divorced from any concrete harm," and thus cannot "satisfy the injury-in-fact requirement of Article III." *Id*. at 1549. Plaintiff's contrary contention would not only ignore controlling precedent regarding the limits of Article III but also would, if accepted, invite a flood of

dubious, wasteful, and lawyer-driven litigation brought on behalf of anyone who witnessed a technical violation of the TCPA or similar statutes.

Such vexatious claims are particularly likely to manifest as class actions. Thus, even in cases where Article III standing is properly established, courts must vigorously enforce the Rule 23 class-certification requirements to prevent abuse of the class mechanism. The district court in this case did just that, and correctly concluded that class certification is inappropriate because plaintiff's proposed class is not ascertainable.

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). Yet aggregate treatment is only appropriate if the major legal and factual questions in the case can be adjudicated on a classwide basis. 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 this Court's "ascertainability" rule. 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. Yet no one disputes that defendants must be afforded the right to test that each would-be plaintiff was injured by the defendant's conduct and thus has a claim, which is why the named plaintiff must (among other things) come forward with a reliable and administratively feasible method for identifying absent class members before a class can be certified. *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015).

In this way, ascertainability gives effect to Rule 23(b)(3)'s predominance and superiority requirements. Common issues of law and fact cannot predominate over individualized issues 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.

Some, including the plaintiff here, contend that class membership can be established by simply allowing each potential plaintiff to provide an affidavit swearing that she was injured by the defendant's allegedly unlawful conduct. But unless the accuracy of such affidavits is capable of verification on a classwide basis, this trial-by-affidavit approach either (i) deprives the defendant of a meaningful opportunity to test the truth and accuracy of the claims against it or (ii) fails predominance and superiority because individualized mini-trials would be

necessary to test each affidavit. Neither option is workable or consistent with Rule 23—under the proper governing principles, the plaintiff must, at a minimum, develop a reliable screening model to objectively corroborate the veracity of affidavits.

Nor can a court delay that identification process until after the class has been certified. As with the affidavit approach, kicking the can down the road is no solution at all. At best, it conflicts with the Supreme Court's consistent admonition that class-certification questions must be resolved at the class-certification stage. At worst, 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 allowed their due-process right to test the existence of each plaintiff's claim.

ARGUMENT

I. PLAINTIFF LACKS STANDING BECAUSE HE HAS NOT SUFFERED A CONCRETE HARM.

Article III standing is the "irreducible constitutional minimum" necessary for any case to proceed in federal court, *Lujan*, 504 U.S. at 560, whether it is an individual or purported class action: "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *see also Spokeo*, 136 S. Ct.

at 1547 n.6.

Injury-in-fact is the "foremost" of the standing requirements. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). To satisfy this element, the plaintiff must show that she has suffered a "particularized" injury—an injury that "affect[ed] the plaintiff in a personal and individual way"—and that this injury is "concrete," i.e., that it "actually exist[s]." *Spokeo*, 136 S. Ct. at 1548-49. It is therefore not enough to allege an unadorned statutory violation to demonstrate Article III standing; as the Supreme Court reaffirmed just last Term, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549.

Spokeo plainly forecloses plaintiff's claim here. At issue there was a profile generated by Spokeo, a "people search engine," which allegedly contained inaccurate information about the plaintiff, Robins. *Id*. at 1546. Robins brought suit under the Fair Credit Reporting Act (FCRA), and the Ninth Circuit concluded that Robins had standing on the ground that the alleged violation of Robins's statutory rights under the FCRA constituted an injury-in-fact. *Id.* at 1544-45. The Supreme Court vacated and remanded, holding that an alleged statutory violation alone is not enough to confer standing. *Id.* at 1549 ("Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."). Rather, Robins was required

to allege and prove that the alleged statutory violation caused him to suffer concrete, real-world harm. *Id*.

Plaintiff in this case cannot possibly satisfy that standard. He has alleged nothing more than a violation of the TCPA, disconnected from any actual, concrete harm. Sometime in 2009, plaintiff claims he listened to a message on his roommate's answering machine or voicemail. Plaintiff says that this message was left in violation of the TCPA, but he has not—and indeed cannot—identify any resulting concrete harm sufficient to establish that he suffered an injury-in-fact. Plaintiff neither alleged in his complaint nor provided evidence at summary judgment that he suffered emotional distress, incurred a monetary cost, or was interrupted in some other activity; nor could he, as he merely chose to listen to a brief message left for his roommate. He did not identify any real-world harm at all. The district court's contrary view—that Plaintiff's allegation of a TCPA violation "entitl[ed] him to bring suit for the inconvenience of receiving unsolicited prerecorded calls," A-167—squarely conflicts with the Supreme Court's decision in *Spokeo*, because plaintiff has alleged nothing more than "a bare procedural violation, divorced from any concrete harm." 136 S. Ct. at 1549. Certainly, plaintiff's mere displeasure with being subjected to a phone call that he believes violated a statutory requirement cannot count as concrete harm—if it did, then *every* statutory violation would give rise to an Article III injury. *Spokeo* forecloses

that result. This case should have been dismissed for lack of jurisdiction.

II. THE COURT SHOULD AFFIRM THE DISTRICT COURT'S DENIAL OF CLASS CERTIFICATION BECAUSE PLAINTIFF'S PROPOSED CLASS IS NOT ASCERTAINABLE.

The district court correctly held that plaintiff's proposed class could not be certified because it is not ascertainable. The ascertainability principle, which flows directly from the predominance and superiority requirements of Rule 23, protects defendants' due process rights while ensuring the efficiency benefits of class adjudication in cases where they in fact exist.

A. Rule 23(b)(3) Authorizes Class Certification Only Where There Is A Practical Method For Classwide Adjudication That Is Consistent With Due Process.

"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, 348-49 (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 under Rule 23.'" *Gen. Tel. Co.*, 457 U.S. at 155 (quoting

Yamasaki, 442 U.S. at 701).

Of course, not every group of individual claims calls for class treatment. Where deciding the claims of a class will eventually devolve into a "series of mini-trials," a putative class action cannot satisfy the requirements of Rule 23, and the class may not be certified. *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1253 (2d Cir. 2002) (Sotomayor, J.). That principle applies not only to plaintiffs' claims, but also to defenses. Indeed, Rule 23's "procedural protections" are grounded in "due process," *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008), and were carefully crafted not only to allow plaintiffs to aggregate claims, but also to protect defendants' due-process rights, including the right "to present every available defense." *Lindsey*, 405 U.S. at 66 (quotation omitted). Courts—including this one—have thus avoided reading the Rule in a manner that would deprive a defendant of its right "to litigate its ... defenses to individual claims." *Dukes*, 564 U.S. at 367. "[D]efendants have the right to raise individual defenses against each class member," and where "the right of defendants to challenge the allegations of individual plaintiffs is lost," a class action cannot be certified. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (quotations omitted).

One such defense is that the plaintiff has no claim at all because he or she was never a class member to begin with. *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.”). Thus, there is no doubt that, had this case been brought as an individual action, the plaintiff would have had to offer evidence that he received one of the challenged messages, and the defendant would be allowed to challenge the plaintiff’s proof. The same is true in a class action, which 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).

B. This Court’s Ascertainability Requirement Flows From, And Is Compelled By, Rule 23(b)(3).

There is no plausible dispute about the above principles. The question is how to give them effect. The answer is to assure that “the class is ‘sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.’” *Brecher*, 806 F.3d at 24 (quoting 7A Charles Alan Wright & Arthur Miller, et al., *Federal Practice & Procedure* § 1760 (3d ed. 1998)). This “ascertainability” rule flows directly from the requirements of Rule 23(b)(3).

1. *This Court’s Ascertainability Requirement Protects A Defendant’s Right To Challenge Class Membership While Preserving The Benefits Of Class Adjudication.*

This Court’s “ascertainability” requirement 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 defendants' conduct). To satisfy that requirement, a plaintiff must do more than merely show that the class is defined using objective criteria; she must show that there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. *Brecher*, 806 F.3d at 25 (citing, e.g., *Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452, at *12 (S.D.N.Y. Aug. 5, 2010) (a class must be "readily identifiable, such that the court can determine who is in the class and, thus, bound by the ruling" (quotations omitted)). While the plaintiff need not compile "a complete list of class members at the certification stage," a plaintiff does need to show that class members *can* be "identified." *Id.* at 25 n.2; *accord Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015).

This requirement ensures that a defendant can exercise its due-process right to "test the reliability of the evidence submitted to prove class membership" on a classwide basis rather than through a series of mini-trials inconsistent with the class mechanism. *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *see also Brecher*, 806 F.3d at 26 (a class cannot be certified where "determining class membership would require ... individualized mini-hearings"); *Karhu v. Vital Pharmas., Inc.*, 621 F. App'x 945, 948-49 (11th Cir. 2015) (same). By requiring the plaintiff to come forward with a workable and testable method for identifying

absent class members, ascertainability "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (quotations omitted).

It is fundamental that the plaintiff must make this showing at the class-certification stage. *Brecher*, 806 F.3d at 25 n.2; *Karhu*, 621 F. App'x at 947; *Byrd*, 784 F.3d at 163. The Supreme Court has made clear that key questions concerning class certification must be resolved *before* a class is certified, mandating that "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23" before certification, and that courts "conduct a 'rigorous analysis' to determine whether" she has met that burden. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013) (quoting *Dukes*, 564 U.S. at 350-51)). And it is not enough for a plaintiff 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).

This timing element has not only legal but practical significance—unless certification issues are addressed at the certification stage, they will likely never be addressed at all. As the Supreme Court has explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation

cost[]" 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 "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). Because "the certification 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 meaningful 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. *This Court's Ascertainability Rule Flows From The Express Requirements Of Rule 23(b)(3).*

While the ascertainability rule protects important due process principles, it also reinforces the express provisions of Rule 23(b)(3) itself.

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 possibly satisfy this burden without offering an administrable method of identifying would-be class members.

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 claims require individual treatment. *McLaughlin*, 522 F.3d at 228. 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." *Comcast*, 133 S. Ct. at 1430.

A plaintiff cannot satisfy predominance where there is no administrable method for identifying class members, because 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 series of plaintiff-by-plaintiff sideshows dedicated to determining who received the challenged message, or bought a particular product, would so overwhelm any common questions that the benefits of class adjudication would be lost entirely. *See, e.g.*, *Brecher*, 806 F.3d at 26 (noting that ascertainability is designed to

prevent "individualized mini-hearings").

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 in this case, 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).

In short, "[w]hether addressed under the heading of 'ascertainability' or 'manageability,' the fact remains that in order for a class to be certified, the proposed class must be both ascertainable in theory and readily identifiable (thus, administratively manageable) in fact." *Dumas v. Albers Med., Inc.*, 2005 WL 2172030, at *7 (W.D. Mo. Sept. 7, 2005). Plaintiff's proposed class is not ascertainable because there is no administratively feasible way to ensure that each would-be class member actually received defendant's message. It fails predominance because determining who is properly a member of the class would necessarily require individualized mini-trials on class membership. 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. Trial By Affidavit And Claims-Administrator Mini-Trials Are Not Legitimate Substitutes For Proper Ascertainability.

While plaintiffs often suggest relaxing the requirements of proving class membership or delaying consideration of ascertainability until after certification, neither proposal is consistent with a defendant's due process rights and Rule 23(b)(3).

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

Plaintiffs—like the plaintiff here—often contend that the concerns identified above can be addressed by allowing absent class members to self-identify through affidavits. But allowing plaintiffs to assert a claim by affidavit does not solve the problems that animates the ascertainability rule. To the contrary, such an affidavit requirement *demonstrates* the problem, because either the defendant (i) would have to be given the opportunity to challenge the veracity of each affidavit, thus undermining the predominance and superiority requirements discussed above, or (ii) would be deprived of its fundamental due-process right to challenge each claim against it. Thus, "[c]ourts have rejected proposals to employ class member affidavits and sworn questionnaires as substitutes for traditional individualized proofs" because such submissions are "not subject to cross-examination." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8.6 (12th ed. 2015).

This does not mean that there is a records requirement for certification. A plaintiff may still rely on affidavits to identify absent class members if he or she also proposes "a case-specific and demonstrably reliable method for screening each affidavit." *Karhu*, 621 F. App'x at 949 n.5; *Carrera v. Bayer Corp.*, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (Smith, J., opinion sur denial of panel rehearing) (ascertainability may be satisfied by "submit[ing] a screening model specific to th[e] case that can reliably distinguish between accurate affidavits and fraudulent or inaccurate ones"); *see also Brecher*, 806 F.3d at 25 & n.2 (the plaintiff need only show that class members *can* be identified). In this way, a defendant's due-process rights are meaningfully protected, notwithstanding the use of conclusory affidavits, because the defendant retains the ability to "challenge the reliability of the screening model" to ensure that that only truthful affidavits are credited. *Carrera*, 2014 WL 3887938, at *3 (Smith, J., opinion sur denial of panel rehearing); *see also Karhu*, 621 F. App'x at 948-49. Due process merely forbids the plaintiff from relying on affidavits alone. *Compare Byrd*, 784 F.3d at 169-70 (no ascertainability problem where public records could readily corroborate proposed affidavits identifying members of subclass).

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. Uncorroborated affidavits are especially unreliable in this context because

putative class members often will struggle to accurately recall their purchases years after the fact.

Consider the following examples:

- In *Ault v. J.M. Smucker Co.*, consumers were asked to recall their purchases of cooking oils—but only those from specific brand extensions, and of those, only those with an "All Natural" label, which appeared on different brand extensions at different times. 310 F.R.D. 59 (S.D.N.Y. 2015).

- 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).

- 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 or thousands of class members would eliminate the efficiencies of classwide adjudication.

The same is true in this case, which involves a phone message that caused no

actual harm. As the district court correctly explained, class members cannot "realistically be expected to recall a brief phone call received six years ago or be expected to retain any concrete documentation of their receipt of such a phone call." A-172. Absent "[d]ocumentary evidence" establishing "the parameters of the class,"—i.e., an objective and reliable method for corroborating the claims of putative class members—a plaintiff's say-so cannot stand in for actual proof establishing class membership. *Id*.

At its core, that is what the ascertainability requirement is all about. It ensures that a would-be plaintiff's claim to recovery is based on something more than speculation or guesswork, 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. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969) ("factfinder is not entitled to base a judgment on speculation or guesswork").

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

Plaintiff's amici, echoing the Seventh Circuit's decision in *Mullins*, advocate a different approach allowing courts to defer any assessment of a plaintiff's method for identifying class members until *after* the class is certified. *See* Brief of Amici Curiae Public Citizen, Inc. et al., at 15-16, 21-24; *see also Mullins v. Direct*

Digital, LLC, 795 F.3d 654, 664 (7th Cir. 2015). That approach conflicts with Rule 23 and due process principles, not to mention Supreme Court precedent.

As a threshold matter, this approach cannot be squared with the Supreme Court's repeated admonition that key questions concerning the propriety of class treatment must be resolved at the class-certification stage. *See, e.g.*, *Halliburton*, 134 S. Ct. at 2412; *Comcast*, 133 S. Ct. at 1432-33; *Dukes*, 564 U.S. at 350. Moreover, amici's approach invites a significant practical problem—delaying a defendant's due process right to challenge class membership until after a class has been certified all but assures that defendants will be deprived of that right altogether because of the tremendous settlement pressure imposed by the class certification order itself. *Mullins* suggested that "if a problem is truly insoluble, the court may decertify the class at a later stage of the litigation," 795 F.3d at 664, but there is unlikely ever to be a later stage of the litigation. Rather, a defendant will be pressured to settle meritless claims based on a class that does not satisfy the requirements of Rule 23.

Amici's response appears to be that the possibility of fraudulent or mistaken affidavits is "essentially [a] claim administration issue[]," more appropriately handled by claims administrators than Article III judges. *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. And in any event, the claims-administration suggestion relies on sources concerning class *settlement* administration, *see id.* (citing *Manual for Complex Litigation* § 21.66-.661 (4th ed. 2004), and William B. Rubenstein, *Newberg on Class Actions* § 12:20 (5th ed.))—a context in which the defendant *waives* the right to an 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 an Article III adjudication of whether a plaintiff was injured by the defendant's conduct only exacerbates the due-process problem, and certainly does not solve it. *See 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 basic issues involved in the litigation").

3. *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 part by the worry that ascertainability may foreclose individual redress in cases involving low-value individual claims. *See* Appellant's Brief at 28-30. But enforcing the ascertainability requirement will not (and has not) spelled the end of the consumer class action—all ascertainability requires is an administrable and reliable

mechanism for identifying absent class members. These concerns are also not well founded, and certainly cannot justify jettisoning due-process and Rule 23 protections.

The premise that certification of low-value class actions 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.

The available data regarding the distribution of class settlements confirm that absent class members benefit very little where they are not easily identified and thus direct notice is not feasible. For example, in connection with the settlement of a class action involving purchasers of Duracell batteries, the class settlement administrator explained that based on "hundreds of class settlements, it is [the administrator'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." *See* Decl. of Deborah McComb ¶ 5, *Poertner v. Gillette Co.*, No. 6:12-cv-00803 (M.D. Fla. Apr. 22, 2014).[2] The settlements reviewed 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.*

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

The median claims rate for those cases was a paltry ".023%"—which is roughly 1 claim per 4,350 class members. *Id*. If these cases are any guide, in the mine-run class action involving products for which class members are not readily identifiable and direct notice is legally impossible, approximately *99.98%* of class members receive *no benefit* at all.

These data were consistent with a recent study conducted at the request of the Chamber's Institute of Legal Reform, in which a team of lawyers undertook an empirical analysis of 148 consumer and employee class actions filed in or removed to federal court in 2009.[3] 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.[4] 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, plaintiffs' lawyers are handsomely rewarded for class action settlements, "[s]ince attorneys' fees in class actions are often

[3] 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/.

[4] 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 n.20, thus distinguishing that case from the small-dollar consumer class action discussed here.

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 Jordan 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. *See, e.g.*, *In re Hotel Tel. Charges*, 500 F.2d 86, 91 (9th Cir. 1974) ("Whenever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute.").

Nor is certifying a class whose members cannot be identified the only way—

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

or even the best way—to deter alleged wrongdoing. In most cases involving low-value consumer goods, the federal or state regulatory apparatus will be better suited to that task. Take the cases discussed above. Each involved a product regulated by the Federal Food and Drug Administration (FDA), which has a broad mandate to ensure that food and drug labels are accurate and do not mislead consumers. Indeed, one of the principal goals of the federal food labeling legislation is "to provide national uniformity" in labeling standards, while allowing "industry to conduct business in an efficient and cost-effective manner." 58 Fed. Reg. 2462, 2465 (Jan. 6, 1993) (citing 136 Cong Rec. H12954 (1990)). Entrusting the FDA with maintaining that balance would be far more efficient than permitting myriad class actions raising the issue one product at a time—and with the potential for different litigation outcomes leading to different rules governing product labels in different states—and sometimes, even within the same state.

The same is true here. Congress created numerous avenues for enforcement of the TCPA, including suits by states attorneys general in which the Federal Communication Commission (Commission) may intervene. 47 U.S.C. § 227(g). "The TCPA [also] envisions civil actions instituted by the Commission for violations of the implementing regulations" and allows the Commission to "seek forfeiture penalties for willful or repeated failure to comply with the Act or regulations." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 746 n.4 (2012)

(citing 47 U.S.C. §§ 227(g)(7), 503(b), 504(a)). Class actions simply are not required to police every violation of that statute.

But in any event, policy arguments provide no excuse for relaxing the requirements of Rule 23. "[P]olicy 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, 2309-10 (2013) (quotations omitted). Fundamental principles of class-action law and due process recognized by the Supreme Court and this Court require affirming the district court's denial of plaintiff's motion for class certification.

III. RELAXING THE CONCRETE HARM OR ASCERTAINABILITY REQUIREMENTS WOULD INVITE ABUSIVE CLASS-ACTION LITIGATION.

To the extent policy considerations are relevant here, they require rigorous enforcement of both the concrete-injury and ascertainability requirements discussed above. Allowing a technical statutory violation, standing alone, to replace injury-in-fact and failing to enforce the ascertainability requirement of Rule 23 both would encourage lawyer-driven class actions brought on behalf of class members who have often suffered no actual harm and will receive no benefit. Such nuisance class actions are particularly attractive to enterprising lawyers,

because if all that must be proven is a statutory violation—without any need to prove a real injury or a reliable way of determining who was even subject to the violating conduct—commonality under Rule 23(a)(2) and predominance under Rule 23(b)(3) would collapse into a single-issue inquiry: Did a statutory violation occur?

The ease with which mere allegations of a statutory violation could be parlayed into class certification would encourage class counsel to forgo traditional claims based on actual injuries in favor of suits where the only thing common to class members is the defendant's alleged technical violation of a statute. Indeed, enterprising class action attorneys have already caught on to this trick. *See, e.g.*, *Chakejian v. Equifax Info. Servs., LLC*, 256 F.R.D. 492, 499-500 (E.D. Pa. 2009) (named plaintiff "elect[ed] to forego actual damages"). Rather than litigate the alleged statutory violations in the context of the actual individual injuries they might cause, class-action lawyers deliberately litigate their claims of statutory violations in the abstract to increase the chances of certification alongside the settlement amounts. *See, e.g.*, Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009) ("What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiple a minimum $100 statutory award … by the number of individuals in a nationwide or statewide class.").

In stark contrast to the purported injuries of such plaintiffs, the injuries inflicted upon businesses (and ultimately consumers) by the non-enforcement of standing and ascertainability requirements are anything but abstract. Litigation costs alone are immense, and for companies with many customers or mass-market products, suits like these create a risk of crippling damages for conduct that caused no actual harm. The result: settlement payouts that overcompensate for nonexistent injuries and over-deter insubstantial regulatory violations—in other words, deadweight economic loss.

Moreover, enforcement of the ascertainability requirement is crucial even beyond technical-statutory-violation cases. For example, a frequent class action target is the labeling of consumer packaged goods, including everything from shampoo to potato chips.[6] Much like the no-injury cases discussed above, an entire cottage industry has arisen of plaintiffs' attorneys who bring such cases in the hopes of obtaining class certification and then extracting a settlement.

Between 2008 and 2012, for instance, the number of consumer fraud class actions brought in federal court against food and beverage companies skyrocketed

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[6] Greg Trotter, *Lawsuits challenging food labels on the rise, but are they good for consumers?*, Chicago Tribune (May 6, 2016), http://www.chicagotribune.com/business/ct-food-labeling-lawsuits-0506-biz-20160506-story.html.

from 19 to more than 102.[7] The lure of large settlements and steep attorneys' fees are the principal driver of these cases. As Congress concluded a decade ago, the class-action device is often used to drive "settlements in which the attorneys receive excessive attorneys' fees with little or no recovery for the class members themselves." S. Rep. 109-14 (2005) (CAFA). Consumer class actions are often where ascertainability concerns are most pronounced and so conscientious application of the ascertainability requirement will do much to prevent abuse of the class action.

These recent trends illustrate the sort of costly and unjustified nuisance suits that would be invited by the failure to diligently enforce the requirements of Article III and Rule 23(b)(3). And they underscore the importance of properly applying these doctrines in this case.

CONCLUSION

This case should accordingly be remanded with instructions that the district court dismiss for lack of jurisdiction or, in the alternative, the district court's denial of class certification should be affirmed.

[7] Jessica Dye, *Food companies confront spike in consumer fraud lawsuits*, Reuters (June 13, 2013), http://sustainability.thomsonreuters.com/2013/06/14/food-companies-confront-spike-in-consumer-fraud-lawsuits/.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the word processing program, this brief contains 6,998 words and therefore is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B).

/s/ Anton Metlitsky
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 14, 2016. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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