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 *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

May a court certify a class under Federal Rule of Civil Procedure 23(b)(3) where the plaintiff fails to make any showing of a reliable and administratively feasible means for ascertaining class membership?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amicus curiae* Atlantic Legal Foundation states the following:

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976. Its mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists.

The abiding interest of Atlantic Legal Foundation in the proper application of class actions is exemplified by its participation as *amicus* or as counsel for *amici* in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), this term in

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[1] Pursuant to Rule 37.2(a), timely notice of intent to file this *amici* brief was provided to the parties, and all parties have consented to the filing of this brief. The consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus curiae* affirms that 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. No person other than *amicus curiae* nor its counsel made a monetary contribution to the preparation or submission of this brief.

Tyson Foods v. Bouaphakeo, No. 14-1146, and other cases in this Court.

INTRODUCTORY STATEMENT

This case arises out of a purported consumer class action in which the plaintiff alleges that he purchased a non-prescription glucosamine "supplement" to relieve discomfort and stiffness in his knees caused by jogging, and that the product was made and marketed by defendant.

Plaintiff Mullins testified that he bought Direct Digital's "Instaflex" from a GNC store in February 2013, and that there were about "10 to 15" similar products on the shelves at the time. Petition at 6. Mullins testified that he paid cash, and thus has no proof of purchase – no receipt, no credit card statement, and no other documentary evidence of his purchase. Pet. 6-7. He did not retain the bottle of Instaflex that he claimed to have purchased because he discarded it, even though he began to think about suing Direct Digital within weeks of the purchase. Pet. 7. He did not tell anyone that he bought Instaflex (*id.*), at least not until a lawyer had already contacted him about suing Direct Digital. *Id*.

In or about March, 2013, Mullins received a phone call from a family friend and attorney who specializes in plaintiffs' class actions, and who mentioned to Mullins that he was considering suing about glucosamine products; he asked

Mullins if he had taken any. Mullins said that he had taken Instaflex. Pet. 7.

On March 8, 2013, Mullins, represented by the attorney-friend, filed this action seeking to assert a class action against Direct Digital. Pet. 7. The complaint alleged that statements on Instaflex's product packaging – for example, that Instaflex is "scientifically formulated" to "relieve discomfort" – are not true. *Id*. Mullins, on behalf of himself and all others similarly situated, claimed that these statements violate the Illinois Consumer Fraud Act. *Id*.

Mullins moved to certify a class of "[a]ll consumers in Illinois and states with similar laws, who purchased Instaflex within the applicable statute of limitations." Pet. App. 43a.

Direct Digital opposed Mullins' motion, arguing that Mullins had failed to satisfy Rule 23(b)'s ascertainability requirement. Direct Digital argued that Mullins' proposed class could not be certified because Mullins had made no showing that the members of the class could be feasibly and reliably ascertained. Pet. App. 45a-47a.

Mullins argued that the class should be certified so long as the class was defined by "objective criteria," even if there was no way of reliably and feasibly applying those criteria to ascertain class membership. The district court agreed with Mullins and certified a multi-state

damages class. Pet. App. 50a. The district court's ascertainability analysis, consisting of two-sentences, did not address whether the membership of the class could be feasibly identified or reliably confirmed. Pet. App. 46a.

The Seventh Circuit granted Direct Digital's request to appeal the district court's class certification decision, and affirmed the district court's class certification. The Seventh Circuit recognized that Rule 23(b)(3) "requires that classes be defined clearly and based on objective criteria." Pet. App. 7a. The Seventh Circuit also acknowledged that the Third Circuit and the and Eleventh Circuit require not both "objective criteria" defining the class and "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." Pet. App. 13a (quoting *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015)). The Seventh Circuit panel, however, expressly rejected that rule.

The Seventh Circuit held that there is no requirement at the class certification stage for the plaintiff to show that class members could be feasibly and reliably ascertained. Pet. App. 14a. Instead, the court held, a district judge should certify the class, and then "normally should . . . wait and see how serious the problem may turn out to be *after* settlement or judgment." Pet. App. 18a-19a (emphasis added). The Seventh Circuit

panel believed it to be too burdensome to require a plaintiff to show before trial that class members could be feasibly and reliably ascertained and the requirement should not be imposed prior to certification. Pet. App. 14a-15a.

The Seventh Circuit's affirmance of class action certification warrants review because conflicts with this Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), and *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), exacerbates a patent circuit split, recognized by the Seventh Circuit itself, and raises important Due Process concerns. The decisions of the lower courts in this case are inconsistent with fundamental limits on class actions and the recent teaching of this Court regarding the preservation of class action defendants' due process rights.

This Court should grant review to ensure that Rule 23(b)(3), which is a limited procedural device for aggregating liability and damages claims, is not used improperly to expand federal court jurisdiction by creating classes of plaintiffs who cannot show that they meet the objective class criteria and to resolve an acknowledged and significant circuit split.

SUMMARY OF ARGUMENT

The Seventh Circuit's refusal to consider "ascertainability" at the class certification stage raises important Due Process issues. The Seventh Circuit's decision undermines fundamental Due Process interests and conflicts with this Court's recent teaching on the criteria for certification of a class under Rule 23 because it exposes class action defendants to potentially enormous damages and denies defendants their due process right to raise every available defense, in violation of the Rules Enabling Act, 28 U.S.C. §2072(b).

The Seventh Circuit's deferral of consideration of "ascertainability" and certification of amorphous classes will result in settlement of meritless cases. Class actions present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims, and class certification may so increase the defendant's potential liability for damages liability that a defendant will often find it economically prudent to abandon a meritorious defense and settle. The potential for unwarranted settlement pressure is a factor that should be weighed in the certification calculus, but the Seventh Circuit's approach, which defers ascertainment of the parameters of the class until trial or later, defeats that consideration. Class certification in this case was improper because the article III standing of class members cannot be

ascertained at the threshold under the Seventh Circuit's approach.

This case presents an opportunity for the Court with to resolve an acknowledged circuit conflict between the Third, Fourth and Eleventh Circuits on one side and the Sixth and Seventh Circuits on the other side over whether a court can certify a class under Rule 23 when the class representative cannot show how the class members can be feasibly and reliably ascertained. This issue recurs, and should be resolved by the Court.

ARGUMENT

I. The Seventh Circuit's Undermines Fundamental Due Process Interests And Conflicts With This Court's Precedents On Class Certification.

A. The Seventh Circuit's Refusal To Consider Ascertainability At The Class Certification Stage Raises Important Due Process Issues.

The Seventh Circuit's deferral considerations of ascertainability of the scope and size of the class, undermines fundamental Due Process interests and conflicts with this Court's recent teaching on the criteria for certification of a class under Rule 23. It exposes class action defendants to potentially enormous damages and denies defendants their due process right to raise every available defense, in violation of the Rules Enabling Act, 28 U.S.C. §2072(b).

In *Wal-Mart*, this Court emphasized that "[a] party seeking class certification must *affirmatively demonstrate* his compliance with [ ] Rule [23]." *Wal-Mart*, 131 S. Ct. at 2551 (emphasis added). Due process guarantees a defendant "an opportunity to present every available defense," *Lindsey v. Normet*, 405 U.S. 56, 66 (1972); see also *Wal-Mart*, 131 S. Ct. at 2561 ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate, including challenges to claims that the class representative and class

members actually purchased the defendant's accused product. As the Third Circuit correctly observed in *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) "[i]f this were an individual claim, a plaintiff would have to prove at trial he purchased [the product]." That proof would, of course, be subject to challenge by the defendant and the defendant's right to challenge plaintiff's proof cannot be aborted by the class action mechanism.[2] The Rules Enabling Act, 28 U.S.C. §2072(b), requires that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." See *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2561 (2011). Thus, in a class action, the class representative must make a showing at the certification stage that plaintiff's proposed method for ascertaining class membership preserves defendant's ability to challenge claims, and to establish that the proposed method is reliable and administratively feasible.

In its recent Rule 23 class action cases, the Court has taught that lower federal courts must apply a "rigorous analysis" at the certification stage to determine whether "all claims can productively be litigated at once." *See Wal-Mart* , 131 S.Ct. at 2551; *Comcast*, 133 S.Ct. at 1432. The

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[2] Rule 23 itself is "grounded in due process." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008).

Seventh Circuit (and, shortly thereafter, the Sixth Circuit) ignored this Court's teaching by eschewing consideration whether a feasible and reliable means to test class membership exists before certification.

B. The Seventh Circuit's Deferral of Consideration of Ascertainability Will Result In Settlement of Meritless Cases.

This Court recently cautioned that certain class actions present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see also *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (certification "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"); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." The potential for unwarranted settlement pressure "is a factor that should be weighed in the certification calculus." *Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 310 (3rd Cir. 2008).

Whether to certify a class under Rule 23 "is often the most significant decision rendered in . . . class-action proceedings." *Deposit Guar. Nat'l*

Bank v. Roper, 445 U.S. 326, 339 (1980), because, as the Seventh Circuit itself earlier recognized, class certification "turns a $200,000 dispute . . . into a $200 million dispute," creating a "bet-the-company" situation for a defendant that "may induce a substantial settlement even if the [plaintiffs'] position is weak." *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir.2001). "An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Advisory Committee Notes to 1998 Amendment to Fed. R. Civ. P. 23(f).[3]

One scholar has calculated that "[t]he percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%." Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U.L. Rev. 74, 143 (1996); see also Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1873 (2006)("[C]lass certification operates most disturbingly when the underlying merits of class

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[3] Fed. R. Civ. P. 23 was amended expressly to ameliorate this potentially distorting effect of class certification by creating a discretionary right to interlocutory appellate review.

members' claims are most dubious."). *Szabo*, *supra*, at 676. "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 98-99 (2009).

C. Class Certification Was Improper Because The Article III Standing Of Class Members Cannot Be Ascertained At The Threshold Under the Seventh Circuit's Approach.

A "class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). *Comcast*, 133 S.Ct. at 1432. Article III permits federal courts to provide redress only for actual injuries that are fairly traceable to a defendant. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); see also *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) and *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (judiciary's role is "to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm"). "First, and foremost, there must be alleged (and ultimately proven) an 'injury in fact' – a harm suffered by the plaintiff that is 'concrete' and 'actual and imminent, not 'conjectural' or

'hypothetical.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-103 (1998) (citations omitted).[4] Article III "injury-in-fact" requirement must be satisfied at each "stag[e] of the litigation." *Lujan*, 504 U.S. at 561 (1992). "Courts have no power to presume and remediate harm that has not been established," and "[t]his is no less true with respect to class actions than with respect to other suits." *Lewis v. Casey*, 518 U.S. at 357-58 & 360 n.7; see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (Rule 23 "'requirements must be interpreted in keeping with Article III constraints.'") (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997)).

Rule 23 class actions may aggregate only claims that could be brought individually, but this Court has consistently held that class certification cannot provide class members a right to relief in federal court that the Constitution would deny them if they sued separately violates due process. *See, e.g., Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (recognizing a due-process violation when "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through

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[4] The FLSA similarly requires that an employee establish that her "damage is . . . certain." *Mt. Clemens*, 328 U.S. at 688.

the procedural device of the class action"). The desire for judicial economy override compliance with the standing requirements of Article III.

Standing is a threshold issue. The Seventh Circuit's deferral of consideration of ascertainability in effect denied Direct Digital's right effectively to raise that issue early in the litigation.

II. The Court Should Resolve An Acknowledged Circuit Split.

This case presents an opportunity for the Court with to resolve an acknowledged circuit conflict over whether a court can certify a class under Rule 23 when the class representative cannot show how the class members can be feasibly and reliably ascertained. The Third Circuit, in *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013); and *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). The Third Circuit recognizes the longstanding certification requirement that a class "be currently and readily ascertainable based on objective criteria," *Carrera* at 305 (quoting *Marcus*, 687 F.3d at 593), and that this requirement, like all other Rule 23 requirements, "mandates a rigorous approach at the outset" of any class action suit. *Id.* at 306-07 (citing *Wal-Mart*, 131 S. Ct. at 2551 and *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

The Third Circuit recognized that this requirement is based on a class action defendant's "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." *Id.* at 307. See Rules Enabling Act, 28 U.S.C. §2072(b), which requires that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." *Wal-Mart*, 131 S.Ct. at 2561. That right includes the ability "to challenge the proof used to demonstrate class membership." *Carrer*a at 307. The method chosen to satisfy ascertainability must be sufficiently reliable and will safeguard the defendant's right to challenge class membership, also serve the efficiencies the class action mechanism is designed to achieve. *Id.* at 305 (citation omitted).[5]

Other Circuits have adopted the Third Circuit's approach. The Fourth Circuit, in *EQT Production Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014) (citation omitted) recognized that Rule 23 contains an

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[5] In *Carrera*, as in the instant case, there were no records to ascertain class members, so plaintiff proposed ascertaining class membership by claimants' affidavits. *Id.* at 309. The court found that the reliability of those affidavits was seriously in question because of the likelihood that many class members would "have difficulty accurately recalling their purchases" of the product in question or might be deliberately untruthful. *Id.*

implicit threshold requirement that the members of a proposed class be "readily identifiable," 764 F.3d at 358, citing the Third Circuit decisions, *supra*.

The Eleventh Circuit in *Karhu v. Vital Pharmaceuticals, Inc.*, No. 14-11648, 2015 WL 3560722, at *2-4 (11th Cir. June 9, 2015) (unpublished) applied the Third Circuit's ascertainability analysis, holding that "[a] plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." *Id.* at *3).

Two circuits have rejected the need for establishing ascertainability at the class certification stage. The Seventh Circuit held that although the class plaintiff in this case has no evidence other than his *ipse dixit* that he purchased Instaflex, and thus even his membership in the class cannot be verified, it was appropriate to certify a class with potentially thousands of members who only self-identify as eligible for some recovery. The Seventh Circuit acknowledged that the ascertainability requirement is "well-settled" generally, but expressly rejected the need for plaintiff to proffer a "reliable and administratively feasible way" to ascertain those who fall within the class. *Id.* at

11a. The Seventh Circuit acknowledged that other circuits apply *Carrera*, but held that the requirement of showing a "reliable and administratively feasible way" to ascertain class members was too burdensome. *Id*.

The Sixth Circuit soon thereafter, in *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), agreed with the Seventh Circuit. Rikos purchased defendant's nutritional supplement, and, claiming that it "did not work as advertised," alleged violation of state unfair or deceptive practices statutes, as does Mullins in this case. *Id*. at 502. The district court certified the proposed classes. *Id*. Procter & Gamble argued, *inter alia*, that the proposed class was not ascertainable because plaintiffs "failed to demonstrate that there is a 'reliable' and 'administratively feasible' method for identifying the class members." *Id*. at 524 (citation omitted). The Sixth Circuit affirmed, seeing "no reason to follow *Carrera*," citing the Seventh Circuit's rejection of it in this case. *Id*. at 525.

Thus the Third, Fourth, and Eleventh Circuits[6] interpret Rule 23 to require a class action plaintiff to show at the certification stage that a class can be defined by objective criteria *and* that the class members can be feasibly and reliably ascertained. The Seventh and Sixth Circuits have rejected the requirement of such a threshold showing and have held that a class can be certified without any showing that the membership of the class can be ascertained in a manner that is efficient *and* reliable.[7]

Under the Third Circuit's approach, which we advocate here, a plaintiff need only show that class members can be identified in a manner consistent with a defendant's due process rights and Rule 23 class action goals.[8]

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[6] The First Circuit in *In re Nexium Antitrust Litigation*, affirmed class certification, but recognized that at the certification stage the mechanisms for substantiating a would-be claimant's bona fides must be "'administratively feasible,' and protective of defendants' Seventh Amendment and due process rights." 777 F.3d 9, 19 (1st Cir. 2015) (quoting *Carrera*, 727 F.3d at 307).

[7] As shown in the Petition, district courts are also divided on this question. See Pet. ___.

[8] Contrary to the Seventh Circuit's suggestion, requiring plaintiffs to proffer a reliable and administratively feasible way to ascertain class membership will not "bar[] low-value consumer class actions," Pet. App. 15a.

Due process accords defendants a right to test individual claims. That right, we submit, trumps the efficiency sought by the class action mechanism. If the two are incompatible in a particular case, a class action is not appropriate.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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