

No. 15-765

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IN THE

**Supreme Court of the United States**

THEODORE H. FRANK,  
*Petitioner,*

v.

JOSHUA D. POERTNER, ON BEHALF OF HIMSELF AND ALL  
OTHERS SIMILARLY SITUATED, ET AL.,  
*Respondents.*

On Writ of Certiorari to  
the United States Court of Appeals  
for the Eleventh Circuit

**BRIEF AMICUS CURIAE OF NEW JERSEY CIVIL  
JUSTICE INSTITUTE IN SUPPORT OF  
PETITIONER**

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## QUESTIONS PRESENTED

1. Is the Rule 23 implied requirement that a class be ascertainable a separate requirement for approval of pre-certification class action settlements?

2. Does the ascertainability requirement separately demand the demonstration of an administratively feasible method of reliably identifying class members that does not require “much, if any individual factual inquiry?”

TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES.....	v
STATEMENT OF INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	4
I. THE APPROACH OF THE ELEVENTH CIRCUIT TO SCRUTINIZING CLASS ACTION SETTLEMENTS UNDERMINES THE OBJECTIVES OF RULE 23 AND THE APPROACH OF THE THIRD CIRCUIT TOWARD IMPLEMENTING THAT OBJECTIVE .....	4
A. THE IMPLIED ASCERTAINABILITY REQUIREMENT OF RULE 23 PROTECTS THE INTERESTS OF PUTATIVE CLASS MEMBERS AT BOTH CERTIFICATION AND PRE- CERTIFICATION SETTLEMENT .....	6
II. CONFUSION OVER THE APPROPRIATE LEVEL OF SCRUTINY OF CLASS ACTION SETTLEMENTS HAS RESULTED IN INCONSISTENT APPLICATION OF THE ASCERTAINABILITY STANDARD.....	8
A. THE ELEVENTH CIRCUIT'S DECISION BELOW VIOLATED THE	

TABLE OF CONTENTS—Continued

	Page
IMPLIED ASCERTAINABILITY REQUIREMENT OF RULE 23 .....	9
B. THE <i>POERTNER</i> DECISION'S LACK OF CLARITY ON PRE- CERTIFICATION SETTLEMENTS HAS UNDERMINED THE ASCERTAINABILITY REQUIREMENT AND RULE 23(E), UNDERCUTTING THE RIGHTS AND INTERESTS OF ABSENT CLASS MEMBERS BY VALUING THE UNASCERTAINABLE CLASS .....	11
CONCLUSION.....	15

## TABLE OF AUTHORITIES

	Page
<i>Cases:</i>	
<i>Amchem Prods v. Windsor</i> , 512 U.S. 591 (1997).....	4-5, 8-10, 14
<i>Alliance to End Repression v. Rochford</i> , 565 F.2d 975 (7th Cir. 1977) .....	5
<i>Carrera v. Bayer Corp.</i> , 727 F.3d 300 (3d Cir. 2013).....	6-7, 15
<i>EQT Prod. Co. v. Addir</i> 764 F.3d 347 (4th Cir. 2014) .....	7
<i>In re Beef Indus. Antitrust Litig.</i> , 607 F.2d 167 (5th Cir. 1979) .....	14
<i>In re Dry Max Pampers Litig.</i> , 724 F.3d 713 (6th Cir. 2013) .....	5
<i>In re Initial Pub. Offerings Sec. Litig.</i> , 471 F.3d 24 (2d Cir. 2006).....	7
<i>In re Nexium Antitrust Litig.</i> , 777 F.3d 9 (1st Cir. 2015).....	7
<i>John v. Nat'l Sec. Fire &amp; Cas. Co.</i> , 501 F.3d 443 (5th Cir. 2007) .....	7
<i>Kahru v. Vital Pharms., Inc.</i> , 621 Fed. Appx. 945 (11th Cir. 2015).....	7, 9
<i>Kinkade v. General Tire &amp; Rubber Co.</i> , 635 F.2d 501 (5th Cir. 1991) .....	14

## TABLE OF AUTHORITIES—Continued

	Page
<i>Oshana v. Coca Cola Co.</i> , 472 F.3d 506 (7th Cir. 2006) .....	6-7
<i>Poertner v. Gillette Co.</i> , 618 Fed. Appx. 624, 630 (11th Cir. 2015) .....	10-11
<i>Simer v. Rios</i> , 661 F.2d 655 (7th Cir. 1981) .....	14
<i>Young v. Nationwide Mutual Ins. Co.</i> , 693 F.3d 532 (6th Cir. 2012) .....	7
<i>Braynen v. Nationstar Mortg. LLC</i> , 2015 U.S. Dist. LEXIS 151744 (S.D. Fla. Nov. 9, 2015).....	11
<i>Carrera v. Bayer Corp.</i> , No. 08-4716 (JLL), 2011 WL 58783786 (D.N.J. Nov. 22, 2011) .....	9
<i>De Los Santos v. Millward Brown, Inc.</i> , No. 13-80670 (S.D. Fla. Sept. 11, 2014) .....	12-13
<i>Fladell v. Wells Fargo Bank, N.A.</i> , No. 13-60721, 2014 WL 5488167 (S.D. Fla. Oct. 29, 2014) .....	12
<i>Hall v. Bank of Am., N.A.</i> ,	

## TABLE OF AUTHORITIES—Continued

	Page
No. 12-22700, 2014 WL 7184039 (S.D. Fla. Dec. 17, 2014) .....	12-13
<i>Hamilton v. SunTrust Mortg., Inc.</i> , No. 13-60749, 2014 WL 5419507 (S.D. Fla. Oct. 24, 2014) .....	12
<i>In re Phenylpropanolamine (PPA) Prods.</i> <i>Liab. Litig.</i> , 214 F.R.D. 614 (W.D. Wash. 2003) .....	6-7, 9
<i>Kamakahi v. Am. Soc’y for Reprod. Med.</i> , 305 F.R.D. 164 (N.D. Cal. 2015) .....	7
<i>Lee v. Ocwen Loan Servicing, LLC</i> , No. 14-60649, 2015 WL 5449813 (S.D. Fla. Sept. 14, 2015) .....	12-13
<i>Marty v. Anheuser-Busch Cos.</i> , 2015 U.S. Dist. LEXIS 144290 (S.D. Fla. Oct. 22, 2015) .....	11, 13
<i>Parsons v. Brighthouse Networks</i> , No. 09-00267 (N.D. Ala. Feb. 5, 2015) .....	12-13
<i>Saccoccio v. JP Morgan Chase Bank, N.A.</i> , 297 F.R.D. 683 (S.D. Fla. 2014) .....	12

## TABLE OF AUTHORITIES—Continued

Page

*Rules:*

Fed R. Civ. P. 23.....	<i>Passim.</i>
23(a) .....	5
23(b) .....	5
23(e) .....	<i>Passim.</i>
Supreme Court Rule 37.....	3
37.2.....	3
37.6.....	3

*Miscellaneous:*

John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, <i>Class Action Litigation- Ascertainability: Reading Between the Lines of Rule 23, 6</i> (2011), available at <a href="http://skadden.com/sites/default/files/publications/publications2371_0.pdf">http://skadden.com/sites/default/files/publications/publications2371_0.pdf</a> .....	8
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**BRIEF AMICUS CURIAE FOR THE  
NEW JERSEY CIVIL JUSTICE INSTITUTE  
IN SUPPORT OF PETITIONER**

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**STATEMENT OF INTEREST OF AMICUS  
CURIAE<sup>1</sup>**

The New Jersey Civil Justice Institute (“NJCJI”) has a strong interest in the clear, predictable and fair application of the law. NJCJI is a statewide, nonpartisan association of over 100 individuals, businesses, and trade and professional organizations dedicated to improving the civil justice system in New Jersey and throughout the Third Circuit. The NJCJI believes a balanced civil justice system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while better ensuring that injured people are compensated fairly for their losses. It is NJCJI’s position that such a system is critical to ensuring fair resolution of conflicts, maintaining and attracting jobs, and fostering economic growth in both in New Jersey and beyond.

In this case, the Eleventh Circuit upheld that the settlement of a class action where no attempt was made to identify actual class members, and where the prospect of identifying members of the class was deemed essentially fruitless. The class was certified for purposes of settlement and the attor-

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<sup>1</sup> Pursuant to this Court’s Rule 37.2(a), *amici* timely notified all parties of their intention to file this brief, and letters of consent from all parties to the filing of this brief have been submitted to 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, its members, or its counsel made a monetary contribution to its preparation or submission.

neys' fee award was approved, despite the fact that the class did not meet the Circuit's own standards for class certification for trial.

A plurality of circuit courts, including the Eleventh Circuit, have followed the lead of the Third Circuit in its application of an ascertainability requirement for class certification. The inconsistent application of this ascertainability requirement encourages precisely the type of class action abuse that the NJCJI opposes: Class actions brought not for the benefit of injured individuals, but for the enrichment of counsel.

The NJCJI has substantial experience working with governments and organizations to enact legal changes to discourage class action abuse in the Third Circuit and the State of New Jersey. Therefore, the NJCJI submits that its experience on the subject of this Petition will provide a useful additional viewpoint to assist the Court in its consideration of this case.

## SUMMARY OF ARGUMENT

This case presents the important question of whether a prospective class in a class action lawsuit must be ascertainable by reliable and administratively feasible methods in order for that class to be allowed to settle. Several Circuits, led by the Third Circuit, and including the First and Fourth Circuits, have answered this question in the affirmative. Other Circuits, including the Sixth and Seventh, have rejected the ascertainability requirement, while the Eleventh Circuit has declined to apply the re-

quirement only at the pre-certification settlement stage.

Requiring that a class be ascertainable by demonstrating an administratively feasible method of reliably identifying class members that does not require extensive individual factual inquiry furthers the objectives of Rule 23. Courts have derived the requirement from Rule 23's enumerated criteria of manageability, predominance of common questions of law and fact, and superiority of class action as a method. Such implication is a sensible interpretation of these rules in practical application.

This ascertainability requirement furthers the Rule 23 interest in protecting the interests of unnamed class members. By requiring that class members be readily and reliably identifiable, courts protect the unnamed class member by providing counsel with otherwise absent incentive to provide the best notice to the class.

Yet, some courts have struggled with the appropriate degree of scrutiny to apply to pre-certification class action settlements. This court's holding in *Amchem Prods., Inc. v. Windsor* set forth modified requirements for scrutinizing pre-certification settlements from a typical certification analysis. 512 U.S. 591 (1997). This confusion among lower courts has resulted in myriad decisions where courts have approved class action settlements of cases that could not meet the certification requirements. These cases consistently have involved courts approving settlements that have been boons for class counsel, while at the same time failing to determine that the interests of the class are being protected. This type of breakdown of incentives presents an opportunity for abuse of the class action

system, and is a state of affairs that infrequently presents opportunities for review.

## ARGUMENT

### I. THE APPROACH OF THE ELEVENTH CIRCUIT TO SCRUTINIZING CLASS ACTION SETTLEMENTS UNDERMINES THE OBJECTIVE OF RULE 23 OF PROTECTING ABSENT CLASS MEMBERS AND THE APPROACH OF THE THIRD CIRCUIT TOWARD IMPLEMENTING THAT OBJECTIVE

The class action settlement stage can be a moment of peril for an unwary party involved in litigation, and a significant moment for potential abuse for class counsel, as the incentive for counsel shifts as settlement allocation between class and counsel is determined by a court. *See* Pet. Cert. 6. As a result of this potential hazard, safeguards have been imposed by rule and by this Court to scrutinize class action settlements to ensure that class counsel has not abandoned the interests of a class (or, in this case, putative class) in favor of his own selfish interests. *See, e.g.*, F.R.C.P. 23(a), (b), (e); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (requiring that a proposed settlement class meet the certification requirements of Rule 23 (a) and (b)); *see also In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013) (describing how the class action settlement stage results in a breakdown of incentives between class counsel and a putative class). An emerging plurality of Circuits have embraced the requirement that a class that is party to the settle-

ment must be ascertainable. Specifically, these courts have required that putative class counsel demonstrate an “administratively feasible” method of reliably identifying class members in order for settlements to be approved.

**A. The Implied Ascertainability Requirement of Rule 23 Protects the Interests of Putative Class Members at both Certification and Pre-Certification Settlement**

Led by the Third Circuit, an emerging plurality of circuit courts have embraced an implied ascertainability requirement for class certification and class action settlement. The Third Circuit has held that class ascertainability is affirmatively a separate requirement and an independent basis for denying class certification. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 312 (3d Cir. 2013). As a separate requirement, ascertainability serves three vital objectives to protect putative class members. First, ascertainability “eliminates serious administrative burdens . . . by insisting on the easy identification of class members.” *Id.* at 305. Second, ascertainability “protects absent class members by facilitating the best notice practicable” to allow members to opt-out of a class or to make a claim on a recovery. *See id.* at 305–06. Third, ascertainability protects defendants’ due process rights to challenge individual class membership. *Id.* at 306.

The ascertainability requirement has been described as an essential characteristic of the Rule 23 requirements of manageability, predominance of common questions of law and fact, and superiority of class action as a method. *See, e.g., Oshana v. Coca-Cola Co.*; 472 F.3d 506, 513 (7th Cir. 2006) (raising the issue of whether a class action is the superior

litigation device when a class is unidentifiable); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 616 (W.D. Wash 2003) (noting that inability to ascertain class may, as a practical matter, render a class unmanageable). While some courts have disagreed on the basis of the Rule 23 requirement, these courts have nevertheless agreed on the requirement's usefulness in assessing class certification and pre-certification settlements.

The Eleventh Circuit is one among several Circuits which have expressly required that plaintiff propose an administratively feasible method for identifying class members in order for a court to certify a class. *Kahru v. Vital Pharms., Inc.*, 621 Fed. Appx. 945, 947 (11th Cir. 2015). *See, e.g., Young v. Nationwide Mutual Ins. Co.*, 693 F. 3d 532, 538 (6th Cir. 2012); *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006) (finding an "implied requirement of ascertainability"); *Oshana v. Coca-Cola Co.*; 472 F.3d 506, 513 (7th Cir. 2006); *Kamakahi v. Am. Soc'y for Reprod. Med.*, 305 F.R.D. 164, 175 (N.D. Cal. 2015) ("a party must show numerosity, commonality, typicality, adequacy and ascertainability."). Additionally, the First and Fourth Circuits have adopted requirements invoking ascertainability in substance, if not in name. *See, e.g., In re Nexium Antitrust Litig.*, 777 F. 3d 9, 19 (1st Cir. 2015) (citing *Carrera v. Bayer Corp.*, 727 F.3d 300, 312 (3d Cir. 2013)) (explaining the need to ensure the mechanisms for substantiating a would-be claimant's bona-fides); *EQT Prod. Co. v. Addir*, 764 F.3d 347, 358 (4th Cir. 2014) (recognizing that Rule 23 contains an implicit threshold requirement that putative class members be "readily

identifiable”). Courts’ consideration of ascertainability of a class in its certification and settlement appraisal reflects the value of the inquiry to the certification process. *See* John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *Class Action Litigation—Ascertainability: Reading Between The Lines of Rule 23, 6* (2011), available at [http://www.skadden.com/sites/default/files/publications/publications2371\\_0.pdf](http://www.skadden.com/sites/default/files/publications/publications2371_0.pdf) (explaining the importance of ascertainability in recent cases).

## II. CONFUSION OVER THE APPROPRIATE LEVEL OF SCRUTINY OF CLASS ACTION SETTLEMENTS HAS RESULTED IN INCONSISTENT APPLICATION OF THE ASCERTAINABILITY STANDARD AT THE SETTLEMENT STAGE

Although a plurality of Circuits have adopted the ascertainability element as a requirement for class action certification, the application of that requirement to pre-certification class action settlements is less consistent.

This Court’s decision in *Amchem Prods. v. Inc. v. Windsor*, 521 U.S. 591 (1999) considered to what extent the requirements of Rule 23 for class certification apply to pre-certification settlements, and concluded that the facts of the settlement were relevant. The Court further held that (1) certification of settlement classes demanded heightened scrutiny under the Rule 23(e) fairness evaluation; and (2) that district courts need not consider whether a class would present intractable management problems were a case to be tried when only conserv-



ing certification issues for purpose of pre-certification settlement. *Id* at 620-21.

However it remains unclear how the holding in *Anchem* applies to the ascertainability requirement at the pre-certification settlement stage. Ascertainability is chiefly concerned with the fairness of the class action and its settlement to the non-present class member. *Carrera v. Bayer Corp.*, 727 F. 3d 300, 305-06. Yet, as a doctrinal matter, ascertainability is rooted in and often evaluated through Rule 23(b)(3)'s manageability requirement. *See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 616 (W.D. Wash. 2003); *see also Carrera v. Bayer Corp.*, No. 08-4716 (JLL), 2011 WL 5878376, at \*3 (D.N.J. Nov. 22, 2011) (couching ascertainability issues in terms of difficulties of managing the class action.) Thus, the competing interests in *Amchem* of heightened interest in fairness against lessened interest in manageability create tension within the application of the ascertainability doctrine. Consequently, while ascertainability can be a useful mechanism for protecting the interests of the unnamed class member and discouraging class actions where class members cannot be identified, courts have struggled over how to apply the ascertainability analysis to pre-certification settlements within the context of *Amchem*.

**A. The Eleventh Circuit's Decision Below Violated the Implied Ascertainability Requirement of Rule 23**

In this case, the Eleventh Circuit did not apply the ascertainability requirement discussed in *Kahru* to its review of the pre-certification settlement.

*Kahru* required plaintiff to “propose an administratively feasible method by which class members can be identified.” *Kahru v. Vital Pharmaceuticals, Inc.*, 621 Fed. Appx. 945, 947 (11th Cir. 2015). The settlement proposed below, by contrast, did not require class members to be affirmatively identified. Instead, the court allowed publication-only notice, as the district court concluded that identifying actual members through loyalty programs would be “difficult, expensive, and essentially fruitless” *Poertner v. Gillette Co.*, 618 Fed. Appx. 624, 630 (11th Cir. 2015).

The *Poertner* court’s decision not to impose even a partial ascertainability requirement and to simply allow notice by publication led to a predictable outcome; namely, only 55,346 class members making claims. This number represented claims totaling less than 0.8 percent of the predicted settlement value. More importantly, this number represented an attorneys’ fee award exceeding 90 percent of the actual recovery.

Both this position and this outcome run contrary to the principles of Rule 23. Furthermore, the invocation of ascertainability principles would likely have resulted in a better outcome for the class. Amongst the multiplicity of concerns of Rule 23(e) is the concern of protecting the interests of unnamed class members. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Class counsel itself produced a declaration from its settlement agent that publication-only notice will “almost always have a claims rate of under one percent.” Pet. Cert. 16. Had the *Poertner* court required class counsel to take extra steps to ascertain the membership of their putative class at this settlement stage, it would have

minimally protected the rights of many unnamed class members by providing them with a method of notice more demonstrably appraised to provide those unnamed members with notice of their available claim. Instead, by forgoing the ascertainability inquiry, the Eleventh Circuit upheld the approval of a settlement that grossly favored class counsel over the class itself.

By failing to apply a consistent standard, and apply the ascertainability standard to pre-certification settlements, the Eleventh Circuit has in fact privileged those class actions that are brought solely with an eye towards settlement. Furthermore, by devaluing the manageability inquiry and declining to apply ascertainability to all certification inquiries, the Eleventh Circuit has also privileged those classes that have not identified class members whatsoever.

**B. The *Poertner* Decision's Lack of Clarity on Pre-Certification Settlement Has Undermined the Ascertainability Requirement and Rule 23(e), Undercutting the Rights and Interests of Absent Class Members by Valuing the Unascertainable Class**

The decision below upholds the unfortunately common practice of district courts in the Eleventh Circuit of approving pre-certification settlements that could not meet the ascertainability requirement for certification. *See, e.g., Braynen v. Nationstar Mortg., LLC*, 2015 U.S. Dist. LEXIS 151744 (S.D. Fla. Nov. 9, 2015) (relying on *Poertner* in approving claims-made settlement and \$5 million fee without informing itself of the class's claims rate or recovery);

*Marty v. Anheuser-Busch Cos.*, 2015 U.S. Dist. LEXIS 144290 (S.D. Fla. Oct. 22, 2015) (relying on *Poertner* to approve settlement and \$3.6 million fee without examining claims rate). These decisions are but the most recent examples of courts approving settlements without any substantial attempt to ascertain the class membership or any consideration of the actual recovery of the class. *See, e.g., Saccocio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 696 (S.D. Fla. 2014) (approving settlement without ascertaining class's share; awarding \$20 million in fees); *Lee v. Ocwen Loan Servicing, LLC*, No. 14-60649, 2015 WL 5449813 (S.D. Fla. Sept. 14, 2015) (citing *Poertner* in support of approving settlement that paid class counsel nearly \$10 million without apprising itself of claims rate class members' actual recovery); *De Los Santos v. Millward Brown, Inc.*, No. 13-80670 (S.D. Fla. Sept. 11, 2015) (approving settlement without ascertaining class's share; awarding fees of \$2.75 million); *Parsons v. Brighthouse Networks*, No. 09-00267 (N.D. Ala. Feb. 5, 2015) (approving settlement without ascertaining class's share; awarding fees of \$3.7 million based on hypothetical 100 percent participation rate); *Hall v. Bank of Am., N.A.*, No. 12-22700, 2014 U.S. Dist. LEXIS 177155, 2014 WL 7184039 (S.D. Fla. Dec. 17, 2014) (approving settlement without ascertaining class's share; awarding fees of \$16 million based on hypothetical 100 percent participation rate); *Fladell v. Wells Fargo Bank, N.A.*, No. 13-60721, 2014 WL 5488167 (S.D. Fla. Oct. 29, 2014) (approving settlement without ascertaining class's share; awarding fees of \$19 million); *Hamilton v. SunTrust Mortgage, Inc.*, No. 13-60749, 2014 WL 5419507, at \*4 (S.D. Fla. Oct. 24, 2014) (approving settlement without

ascertaining class's share; fees of \$3.6 million based on hypothetical 100 percent participation rate). Often, these cases have outright rejected available steps for ascertaining class membership in favor of approving rapid and inexpensive approaches, such as the hypothetical or claims-made class. *See, e.g., Marty v. Anheuser-Busch Cos.*, 2015 U.S. Dist. LEXIS 144290 (S.D. Fla. Oct. 22, 2015); *Lee v. Ocwen Loan Servicing, LLC*, No. 14-60649, 2015 WL 5449813 (S.D. Fla. Sept. 14, 2015). These courts' decisions to not consider the ascertainability has resulted in a barrage of unjust settlements that favor class counsel over the class. *See, e.g., De Los Santos v. Millward Brown, Inc.*, No. 13-80670 (S.D. Fla. Sept. 11, 2015) (approving settlement without ascertaining class's share; awarding fees of \$2.75 million); *Parsons v. Brighthouse Networks*, No. 09-00267 (N.D. Ala. Feb. 5, 2015) (approving settlement without ascertaining class's share; awarding fees of \$3.7 million based on hypothetical 100 percent participation rate); *Hall v. Bank of Am., N.A.*, No. 12-22700, 2014 U.S. Dist. LEXIS 177155, 2014 WL 7184039 (S.D. Fla. Dec. 17, 2014) (approving settlement without ascertaining class's share; awarding fees of \$16 million based on hypothetical 100 percent participation rate). These settlement approvals have had the effect of incentivizing class counsel to do an end-run around the class certification standards by presenting unascertainable classes for the purpose of settlement only, avoiding the scrutiny that the Eleventh Circuit otherwise demands for certification. Additionally, by approving these settlements, these district courts have undermined the specific functions an ascertainable class achieves; specifically, the protection of the absent class member by providing

the best notice practicable and protecting the due process rights of the absent member.

Indeed, courts have recognized the due process role that Rule 23(e) plays. Courts have routinely held that notice of a class action settlement under Rule 23(e) is required as a matter of constitutional due process because an individual's claim cannot be extinguished without the opportunity to be heard. *See, e.g., Simer v. Rios*, 661 F.2d 655, 664 (7th Cir. 1981), *cert denied*, 456 U.S. 917; *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905, 101 S. Ct. 3029 (1981); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1991). Without providing notice directed to all class members under Rule 23, a class action settlement may not be approved. *See* FED.R.C.P. 23(e); *Simer*, 661 F.2d at 663-64; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (explaining that Rule 23(e) protects absent class members from "fainthearted" or "selfish" representation.)

By declining to demand the scrutiny of an ascertainable class at the pre-certification settlement stage, and instead approving settlement classes filled with unknown members unlikely to receive notice or a portion of the a settlement, courts in the Eleventh Circuit are declining to correctly apply due process protections implicit in Rule 23(e), protections which are widely considered and applied across other Circuits.

The decision below has encouraged the settlement of putative class actions that should not have been brought in the first place. If instead, the standard was clear and barred the settlement of actions which could not meet the ascertainability require-

ment, fewer putative class actions would be brought with the primary impact of compensating counsel, and courts could better dispose of those lawsuits having that outcome.

This case presents a rare opportunity to clarify the application of the ascertainability requirement because of the dynamic of class action settlements. By definition, in a settlement, the parties to the settlement are not appealing, so the only way such an issue can become subject to review is if a class member objects to the settlement on the grounds that the lawsuit should not have been brought in the first place.

### CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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