No. 16-1221

In the

Supreme Court of the United States

CONAGRA FOODS, INC.,

Petitioner,

v.

ROBERT BRISENO, ET AL.,

Respondents.

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

BRIEF FOR THE GROCERY MANUFACTURERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

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INTEREST OF AMICUS CURIAE[1]

The Grocery Manufacturers Association ("GMA") is the country's largest food, beverage, and

[1] No counsel for a 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 the amicus curiae or their counsel made a monetary contribution to its preparation or submission. Letters evidencing the parties' blanket consent to the filing of amicus briefs have been filed with the clerk.

consumer product association, representing companies that participate in this $2.1 trillion industry. GMA's member companies include internationally-recognized brands, as well as local and neighborhood businesses.

The GMA advocates for its member companies before courts, legislatures, and executive agencies. To that end, GMA regularly files *amicus curiae* briefs in cases affecting its members' interests. Many of GMA's member companies are defendants in class actions challenging the labeling of those companies' products. Accordingly, GMA has a strong interest in ensuring that class actions are not improperly certified under Federal Rule of Civil Procedure 23.

Ascertainability is central to the operation of Rule 23. To meet it, the putative class must demonstrate—before certification—that there is an administratively feasible way to identify class members. Classes that are unascertainable hurt absent class members because there is no reliable way to provide those putative class members notice (and an opportunity to opt out). Certifying an unascertainable class harms defendants as well, by stripping them of their due process right to test the validity of class members' claims. This transforms the class action device—which this Court has emphasized is an "exception to the usual rule" that cases are litigated individually, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550-51 (2011)—into a mechanism that alters the parties' substantive rights.

The Ninth Circuit's decision below held that ascertainability is not a prerequisite to class certification. If that decision is not overturned, it will lead to continued wrongful certification of class actions against GMA's member companies. GMA therefore has a strong interest in this case, and urges the Court to grant review.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case allows the Court to provide clarity on ascertainability—an issue of central importance under Rule 23, on which the circuit courts are deeply split. Ascertainability requires that, prior to certification, the court has an administratively feasible way to identify members of the putative class. The ongoing uncertainty over this aspect of class action law is especially troublesome for food and beverage manufacturers—and it hurts consumers, too.

Over the past decade, there has been a dramatic increase in class action litigation against the food and beverage industry. In 2008, the number of food labeling class actions in federal court was less than 20; by 2012 it had ballooned to over 100; and today the number stands at over 425—a twenty-fold increase in less than a decade. Many of these cases are filed in district courts within the Ninth Circuit, and the Northern District of California in particular. So many cases are filed in that District, that even the judges there refer to it as the "Food Court."

Some of these lawsuits raise claims so frivolous they border on comical: Do consumers really think that the name "Froot Loops" means that the cereal is made of fruit? Are coffee drinkers really surprised to learn that iced lattes, in fact, contain some ice? But to defendants facing the settlement pressure that comes with a certified class, the explosion of food and beverage litigation is no laughing matter.

Ascertainability provides an important check against unworkable class certification in these cases. It requires courts to decide whether there is an administratively feasible way to identify the millions of consumers of a particular food or beverage product, and do so for a class period that may stretch over many years. In circuits where ascertainability is required, courts often sensibly conclude this cannot be done.

Food and beverage companies typically sell to distributors or retailers, and so have no record of sales to end consumers. Consumers likewise often have no proof (*e.g.*, receipts or other records) that they bought a particular product. And there is often no workable way to gather these facts without the case devolving into a series of mini-trials.

The Ninth Circuit's opinion below holds that ascertainability is not a requirement of Rule 23, deepening an existing conflict on this issue. Other circuits—the Second, Third, Fourth and Eleventh—disagree and impose an ascertainability requirement. Unless it is resolved, this circuit split

will likely channel food labeling lawsuits into the Ninth Circuit even more intensely.

Encouraging a litigation-based regulatory regime undermines the valuable goal of national uniformity for food labeling. This Court and Congress have both emphasized the importance of national standards for food labeling. This uniformity helps food and beverage manufacturers label consistently against known rules. It also helps consumers by providing them with a predictable and stable set of labels for similar foods.

The United States Food and Drug Administration ("FDA") promotes this uniformity by promulgating nationally-applicable regulations forged in an open administrative process. Yet, the circuit split encourages plaintiffs to continue to deputize California federal courts as food labeling agencies on matters within the agency's purview. This undermines the uniformity otherwise promoted by the FDA, a federal agency with the requisite expertise and ability to regulate informed by the views of all stakeholders.

The Court should grant review to resolve the circuit conflict, and clarify that Rule 23 requires ascertainability as a prerequisite to class certification.

ARGUMENT

A. There Has Been a Sustained Increase in Labeling Class Actions Against the Food and Beverage Industry Over the Last Decade.

In 2008, there were about 19 active food labeling class actions pending in federal court. By 2012, that number had grown to 102 cases, a five-fold increase in just four years.[2] The trendlines point to continued expansion: There were 158 new food class actions filed in 2015, and another 145 filed in 2016.[3] Today, there are approximately 425 food labeling class actions in federal court, which means that in less than 10 years the number of these actions in federal court has surged more than twenty-fold.[4]

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[2] Jessica Dye, *Food companies confront spike in consumer fraud lawsuits*, Reuters (June 13, 2013), *available at* http://sustainability.thomsonreuters.com/2013/06/14/food-companies-confront-spike-in-consumer-fraud-lawsuits/ (last visited: Apr. 30, 2017).

[3] Perkins Coie, *Food Litigation 2016 Year in Review: A Look Back at Key Issues Facing Our Industry* (Mar. 28, 2017), *available at* https://www.perkinscoie.com/en/news-insights/food-litigation-year-in-review.html (last visited: Apr. 30, 2017).

[4] Cary Silverman & James Muehlberger, *The Food Court: Trends in Food and Beverage Class Action Litigation*, U.S. Chamber Institute for Legal Reform, at 1 (Feb. 2017), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/TheFoodCourtPaper_Pages.pdf (last visited: Apr. 30, 2017).

As filings have skyrocketed, one venue has emerged as the favorite for plaintiffs' attorneys: the Northern District of California. Between April 2012 and April 2013, at least 68 class action complaints were filed against food and beverage companies in that court.[5] By 2013, 60% of food marketing class actions were being filed in or removed to federal courts in California, and two-thirds of those cases were in the Northern District.[6] Nationwide, a third of all food marketing class actions were pending in the Northern District of California by 2013.[7]

The stampede of litigants to this jurisdiction has even garnered the Northern District of California its own nickname: The "Food Court." *See Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726, at *1 and n.1 (N.D. Cal. June 13, 2014) (acknowledging "the flood" of food litigation cases being filed in the Northern District of California and its accompanying reputation as the "food court"). These lawsuits are often lawyer-

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[5] Anthony J. Anscombe & Mary Beth Buckley, *Jury Still Out on the 'Food Court': An Examination of Food Law Class Actions and the Popularity of the Northern District of California*, Bloomberg Law (June 28, 2013), *available at* https://www.bna.com/jury-still-out-on-the-food-court/ (last visited: Apr. 30, 2017).

[6] Victor Schwartz & Cary Silverman, *The New Lawsuit Ecosystem: Trends, Targets and Players*, U.S. Chamber Institute for Legal Reform, at 91 (Oct. 2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/The_New_Lawsuit_Ecosystem_pages_web.pdf (last visited: Apr. 30, 2017).

[7] *Id*. at 91-92.

driven and filed by serial plaintiffs. For instance, between April 2015 and July 2016, one man was listed as the named plaintiff in five separate food labeling class actions—all filed in the Northern District of California.[8]

These class actions typically seek damages based on the sales of all products sold over a period of years, along with demands for new labeling requirements. They are often premised on the idiosyncratic views of the plaintiffs who file them. For example:

- A putative class action alleging that the cereal Cap'n Crunch Berries is deceptively labeled because there is no such thing as a "Crunch Berry."[9]
- A request to ban the word "Froot" in "Froot Loops" cereal, because consumers purportedly believe "Froot" refers to actual fruit.[10]

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[8] *See Backus v. Biscomerica Corp.*, No. 3:16-cv-3916 (N.D. Cal. filed July 12, 2016); *Backus v. ConAgra Inc.*, No. 3:16-cv-454 (N.D. Cal., filed Jan. 26, 2016); *Backus v. H.J. Heinz*, No. 3:15-cv- 02738 (N.D. Cal., filed June 8, 2015); *Backus v. General Mills Inc.*, No. 3:15-cv-1964 (N.D. Cal. filed Apr. 30, 2015); *Backus v. Nestle USA Inc.*, No. 3:15-cv-1963 (N.D. Cal., filed Apr. 30, 2015).

[9] *Werberl v. PepsiCo, Inc.*, No. 4:09-cv-04456, 2010 WL 2673860 (N.D. Cal. July 2, 2010).

[10] *Videtto v. Kellogg USA*, No. 2:08-CV-01324-MCEDAD, 2009 WL 1439086 (E.D. Cal. May 21, 2009).

- An allegation that Fig Newton cookies are mislabeled because the plaintiff did not believe fruit puree was "real" fruit.[11]
- An allegation that iced lattes are deceptively marketed because they contain, in addition to liquid, some ice.[12]

While Rule 12 disposes of some of the more absurd complaints, many proceed past that stage. Any ruling that increases, even slightly, the possibility of a favorable decision at the class certification stage, creates powerful incentives for class action plaintiffs to choose that venue. The Ninth Circuit's decision below does just that. It removes a meaningful hurdle to class certification in these cases, requiring courts to ignore whether the putative class is ascertainable.

B. The Circuit Split on Ascertainability Is Likely to Drive Additional Class Litigation to the Ninth Circuit.

This sustained rise in food and beverage class actions over the past decade heightens the importance of a consistently imposed ascertainability requirement. A class is ascertainable if it is (a) defined by objective criteria, and (b) administratively feasible to

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[11] *Manchouck v. Mondelēz Int'l Inc.*, C-13-02148-WHA, 2013 WL 5400285, at *2 (N.D. Cal. Sept. 26, 2013), *aff'd sub nom. Manchouck v. Mondelez Int'l, Inc.*, 603 Fed. Appx. 632 (9th Cir. 2015).

[12] *Pincus v. Starbucks Corp.*, No. 1:16-cv-4705 (N.D. Ill., filed Apr. 27, 2016); *Forouzesh v. Starbucks Corp.*, No. 2:16-cv-3830 (C.D. Cal., filed June 1, 2016).

determine whether a particular individual is a member of the class.

Ascertainability is especially important in food class actions because plaintiffs often seek to certify a sprawling class of unidentified consumers who bought low-cost products over a period of years. If an individual did not purchase the defendant's product, then she cannot hold the defendant liable as a member of the class. But memories fade, and consumers rarely keep receipts for a breakfast cereal they may have purchased five years ago. Complicating matters further, in most cases consumers buy the products from retailers (*e.g.*, grocery stores), not from the manufacturer-defendant who made and marketed the product.

So, absent class members are often impossible to identify reliably or notify effectively. That's what makes a class unascertainable: the parties don't know who is in the class, and absent class members don't know whether they are a member. [13]

Courts are split on how to treat ascertainability, and this split affects outcomes at the class certification stage. The Second, Third, Fourth and Eleventh Circuits require ascertainability as a prerequisite to class certification.

For example, in *Marcus v. BMW of North America, LLC*, the Third Circuit held that "[i]f class

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[13] *See Van West v. Midland Nat'l Life Ins. Co.*, 199 F.R.D. 448, 451 (D.R.I. 2001) (noting that the ascertainability of class members is important so that a court can decide "who will receive notice, who will share in any recovery, and who will be bound by the judgment").

members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." 687 F.3d 583, 593 (3d Cir. 2012); *see also Carrera v. Bayer Corp.*, 727 F.3d 300, 303 (3d Cir. 2013) (applying *Marcus* to reverse certification of unascertainable class). The court explained that if class members cannot be ascertained from a defendant's records, there must be "a reliable, administratively feasible alternative," but cautioned "against approving a method that would amount to no more than ascertaining by potential class members' say so." *Marcus*, 687 F.3d at 594. "Forcing [a class action defendant] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications." *Id.*

Applying this standard, or one like it, courts around the country have declined to certify classes that were not ascertainable. *See, e.g.*, *Karhu v. Vital Pharmaceuticals, Inc.*, 621 Fed. Appx. 945, 946-47 (11th Cir. June 9, 2015) (purchasers of dietary supplements); *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (owners of lost cell phones); *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089-90 (N.D. Cal. 2011) (cigarette smokers); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742 (DLC), 2010 WL 3119452,

at *12–13 (S.D.N.Y. Aug. 5, 2010) (purchasers of Snapple beverages).[14]

By contrast, in its decision below the Ninth Circuit concluded that ascertainability is not required for class certification. *Briseno v. ConAgra Foods Inc.*, 844 F.3d 1121 (9th Cir. 2017). The Sixth and Seventh Circuits have likewise rejected ascertainability as a requirement of Rule 23. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015).

Thus, courts—including many in California—have certified classes in food and beverage cases based on an express or implicit rejection of the ascertainability requirement outlined by the Third Circuit. *See, e.g.*, *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 238-40 (N.D. Cal. 2014) (purchasers of at-home smoothies); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) (certifying purchasers of cereal and snack products labeled "Nothing Artificial" even though "Defendant does not have records of consumer purchases, and potential class members will likely lack proof of their purchases"); *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 535 (N.D. Cal. 2012) (certifying purchasers of iced tea, and expressly

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[14] *See also McBean v. City of New York*, 228 F.R.D. 487, 492 (S.D.N.Y. 2005) (describing the implicit but fundamental requirement that "[t]he class that plaintiffs seek to certify must be readily identifiable so that the court can determine who is in the class, and thus, who is bound by the ruling").

allowing absent class members to self-identify that they purchased iced tea with "natural" on the label during the class period).

Imposing an ascertainability requirement in these cases helps prevent certification of otherwise unwieldy and improper classes. The relief sought in food labeling cases is often recovery of a "price premium" allegedly charged for the product, purportedly tied to a particular claim or claims on the label. Yet, classes in these cases are often defined as all purchasers of the product—regardless of whether putative class members saw the disputed label, relied on it for their purchase decision, or even whether the label carried the challenged claim at all. *Compare Bruton v. Gerber Prods.*, 2017 WL 1396221 at *1 (9th Cir. Apr. 19, 2017) (applying *Briseno* to reverse denial of class certification on ascertainability grounds) *with Bruton v. Gerber Prods.*, 2014 WL 2860995, at *6 (N.D. Cal. Jun. 23, 2014) (class certification denied on ascertainability grounds, where 66 out of 69 products in litigation had labels that did not contain challenged statements at some point during class period). Dispensing with ascertainability can allow such classes to be certified nonetheless.

In light of the Ninth Circuit's decision in *Briseno*, which lowers the bar for class certification by rejecting ascertainability, federal courts in California are likely to attract an even greater share of food marketing class actions. Even before *Briseno*, the perception that district courts in California might not impose an ascertainability

requirement encouraged class counsel to file cases there. For example, in litigation challenging the use of "natural" on food labels (the same substantive issue in *Briseno*) plaintiffs' counsel filed a duplicative lawsuit in the Northern District of California, despite the pendency of a previously-filed identical suit pending in the District of New Jersey—where the Third Circuit imposes an ascertainability requirement. *Daniel Kellogg v. General Mills, Inc.*, No. 4:14-CV-00939, 2014 WL 842987 (Complaint) (N.D. Cal., filed Feb. 28, 2014). In resisting transfer of the later-filed action to the District of New Jersey, plaintiffs cited their desire to avoid ascertainability entirely: "It would be highly inequitable and contrary to California public policy to subject Plaintiff and the putative California class to the risk that their claims would [not] be adjudicated on the merits due to the state of the procedural law in the Third Circuit [under *Carrera*]." *Kellogg v. General Mills*, Plaintiff's Memorandum in Opposition to Motion to Transfer Proceedings, No. 4:14-CV-00939, 2014 WL 1841136 (N.D. Cal. Apr. 22, 2014).

So, class counsel already targeted the Ninth Circuit when it was merely possible they might not have to satisfy ascertainability. Incentives to file there are now far greater, as *Briseno* makes it *certain* that putative plaintiffs need not satisfy ascertainability in federal courts there.

C. Continued Litigation Undermines National Uniformity for Food Labeling.

A nationalized system of food labeling benefits consumers and manufacturers alike, with consistent and predictable rules for what will be on food labels—in all places and for all similar foods. *Nemphos v. Nestle Waters N. Am.*, 775 F.3d 616, 620 (4th Cir. 2015) ("Manufacturers can produce and market foods consistently and cost-effectively across the United States. Consumers gain a reliable and comprehensible means of ascertaining the nutritional content of the foods they buy, wherever they may live or travel in this country. Armed with such information, consumers can make well-informed decisions about the types and quantities of ingredients in their diets."); *see also Turek v. General Mills*, 662 F.3d 423, 426 (7th Cir. 2011) ("It is easy to see why Congress would not want to allow states to impose disclosure requirements of their own on packaged food products, most of which are sold nationwide. Manufacturers might have to print 50 different labels, driving consumers who buy food products in more than one state crazy.").[15]

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[15] This Court has also noted the importance of national uniformity for food labeling. *POM Wonderful v. Coca-Cola, Co.*, 134 S. Ct. 2228, 2239-40 (2014) (noting Congress's goal of national uniformity for food labeling could be undermined by "disuniformity that would arise from the multitude of state laws, state regulations, state administrative agency rulings, and state-court decisions that are partially forbidden by the FDCA's preemption provision").

To promote a uniform system for food labeling, Congress vests the FDA with substantial authority to promulgate food labeling regulations that apply nationwide. *See generally* 21 U.S.C. § 343 (giving Secretary of FDA to promulgate regulations related to food labeling); *see also* 21 U.S.C. § 343-1(a) (preempting State-based labeling requirements not "identical" to federal requirements). Moreover, when the FDA acts, it solicits the views of all interested parties, resulting in regulations that are intended to strike a balance among various competing interests. *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001) (noting that in promulgating regulations FDA called upon to strike "delicate balance" of competing objectives).

Yet, despite the stated importance of national standards set by informed federal agencies, the circuit conflict over ascertainability encourages the filing of even more class labeling actions in the Ninth Circuit. This, in turn, enables a litigation-driven labeling regime on matters within the FDA's purview and expertise.

Class certification imposes enormous pressure to settle—even in cases where, absent certification, defendants might otherwise fight and win. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). Indeed, the leverage created by a certified class informed the Third Circuit's decision

to ensure that ascertainability remain a prerequisite to certification. *Marcus*, 687 F.3d at 591 n.2 ("As a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs' counsel.").

It is no different in cases involving food labeling. Class certification—including class certification rulings where an ascertainability requirement is not imposed—can force class settlement. *See, e.g.*, *Lily v. Jamba Juice*, 2015 WL 1248027, at *1 (N.D. Cal. Mar. 18, 2015) (preliminarily approval of class settlement, after certification ruling which ascertainability requirement not imposed). Moreover, terms of class settlement in these cases typically involve some labeling change requested by the class plaintiff, regardless of whether the FDA imposes any similar labeling requirement. *See id.* at *6 (requiring defendant to modify food labeling concerning the term "natural," despite absence of any corresponding federal requirement).

So, the ongoing circuit split over ascertainability engenders a further problem: It risks displacing the expertise of the FDA with the opinions of California plaintiffs and juries. There is no reason to think that the coterie of plaintiffs who file class action lawsuits in the Ninth Circuit accurately represent the views of the FDA on regulatory matters.[16]

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[16] For example, multiple class action lawsuits were filed in California in 2014 and 2015 challenging the use of partially hydrogenated oils ("PHOs") as a food ingredient. These suits

Resolving the split on ascertainability would help ameliorate litigation incentives that favor filings in Ninth Circuit courts. And it would do so over an issue—food labeling—where national uniformity is a longstanding Congressional and FDA imperative.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner Conagra Foods, Inc., the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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insisted that the use of PHOs was unlawful, and called for its immediate cessation as an ingredient. *See*, *e.g., McGee v. Diamond Foods*, 2016 WL 816003 (S.D. Cal. Mar. 1, 2016); *Hawkins v. Kellogg Co.*, 2016 WL 7210381 (S.D. Cal. Dec. 13, 2016); *Backus v. Nestle*, 167 F. Supp. 3d 1068 (N.D. Cal. 2016). Yet, the views of these class plaintiffs were contrary to the FDA's determination on the very same issue made several months later. The agency determined that a gradual three-year phase out of PHOs was needed to "minimize market disruption" during the period of transition to different ingredients. *See* 58 Fed. Reg. 34650, 34669, *Final Determination Regarding Partially Hydrogenated Oils* (Jun. 17, 2015). Ultimately, Congress ended the matter by passing a statute codifying the FDA's determination that a gradual phase out was proper and lawful, resulting in dismissal of many of these suits on conflict preemption grounds. *See* Pub. L. No. 114-113 § 754, 129 Stat. 2242, 2284 (2015); *see also Backus*, 167 F. Supp. 3d at 1072-73 (applying conflict preemption to dismiss complaint given FDA and Congress's action). Without the magnetic effect of an ascertainability-free class certification standard, however, it may not have been necessary to divert the resources of the courts and Congress in this fashion.

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