No. 16-1221

In the Supreme Court of the United States

CONAGRA BRANDS, INC.,

Petitioner,

v.

ROBERT BRISEÑO, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development in the nation.[1]

NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. Many of NAM's members and affiliates are defendants in class actions, and accordingly have a keen interest in ensuring that courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification before certifying a class.

One such requirement is ascertainability, which protects defendants' due process rights by ensuring that class members can be feasibly identified and that defendants have an opportunity to litigate their defenses to any particular would-be class member's claims. This requirement is of particular importance

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' blanket consents to the filing of *amicus curiae* briefs are on file with the Clerk.

to manufacturers, because many manufacturers do not sell directly to the ultimate purchasers of their products and therefore have no records that would aid in feasibly identifying a putative class of such purchasers.

Whether manufacturers and other businesses will be forced to face class claims by unidentified (and unidentifiable) consumers now turns on the happenstance of geography. There is a deep conflict among the federal courts of appeals that cries out for this Court's review. And if decisions like the one below are permitted to stand, it would eviscerate defendants' due process rights in class-action litigation and lead to the unjustified certification of class actions against businesses—benefiting only the lawyers on both sides and (at best) a vanishingly small number of actual class members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal courts are deeply divided on a question of paramount importance: may a damages class action be certified if there is no reliable way to find class members, short of an unmanageable series of mini-trials? The court below said the answer is "yes": in the panel's view, it is unnecessary for a plaintiff to demonstrate "an administratively feasible way to identify class members [as] a prerequisite to class certification." Pet. App. 24a. The Sixth and Seventh Circuits have reached similar conclusions.

By contrast, four circuits—the Second, Third, Fourth, and Eleventh—have held that before a class can be certified, there must be an administrable method for determining who is in the class and who is not.

This stark conflict should not be allowed to persist: class certification—the most critical question in such lawsuits—should not turn on where a putative class action is litigated. And plaintiffs' lawyers will inevitably circumvent the ascertainability requirements adopted in four circuits by filing nationwide or multi-state class actions in federal courts in California or Illinois instead.

That result would be deeply troubling, because the approach taken by the court below (along with the Sixth and Seventh Circuits) violates the due process rights of defendants and Rule 23's strictures. *Amicus* files this brief to explain why these principles require plaintiffs to demonstrate at the class certification stage an administratively feasible method of identifying the persons who fit within the putative class definition.

If this were a single-plaintiff case, there is no doubt that the plaintiff would have to prove at trial that he purchased Wesson-brand cooking oil bearing a "100% Natural" label and that he was injured as a result. Due process would require that the defendant, in turn, be given an opportunity to challenge the plaintiff's evidentiary showing (such as any evidence he might introduce regarding the purchase of Wesson oil). That opportunity would include the right to cross-examine the plaintiff and to have a court or jury resolve any factual disputes.

But in the context of a proposed class action, the court of appeals here cast aside those due process protections. Ironically, the more expansive the proposed class—here, plaintiffs seek to represent a class of people who purchased Wesson oil in eleven states over the past decade—the less concerned the court below appeared to be with the defendant's rights vis-

à-vis particular class members. That approach cannot be squared with this Court's repeated instruction that a Rule 23 class action is nothing more than the sum of the individual class members' claims within it. Courts therefore may not skirt defendants' due process rights by certifying a class "on the premise that [the defendant] will not be entitled to litigate its * * * defenses to individual claims." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 367 (2011).

To do so would violate the Rules Enabling Act, which embodies the due process principle that procedural rules, like Rule 23, cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). As this Court recently reiterated, the Rules Enabling Act bars courts from "giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016).

The ascertainability requirement protects this foundational principle by ensuring that in damages class actions, defendants retain their due process rights to challenge any would-be class member's claim of eligibility to recover. Unless a plaintiff proposes a reliable and administratively feasible method for identifying who is in a class, the only way defendants could bring such challenges—challenges that due process guarantees—would be to permit extensive individualized fact-finding and an unending series of mini-trials. Under such circumstances, no class could reasonably be certified.

The court of appeals paid lip service to due process and the Rules Enabling Act, but none of the rationales it or plaintiffs advanced for rejecting a meaningful ascertainability requirement can with-

stand scrutiny. *First*, defendants' due-process rights cannot be overridden in service of a court's policy preference for certification in what it believes are "those cases that depend most on the class mechanism." Pet. App. 17a. *Second*, outsourcing to claims administrators the resolution of defendants' challenges to class membership does not satisfy defendants' rights to cross-examine their opponents and for judicial resolution of factual disputes. *Third*, in a litigated class action (as opposed to a settlement), numerous courts have rejected on due process grounds the approach suggested by plaintiffs below—calculating a defendant's liability on an aggregate basis based on total sales or revenues (without ever knowing to whom the product was sold) on the assumption that any unclaimed funds can be diverted to *cy pres* recipients.

Finally, the practical consequence of decisions like the one below will be to increase the filing of abusive class actions of dubious merit, generating blackmail settlements with no corresponding benefit to actual class members. Moreover, the ordinary justification for class actions—that they offer benefits for class members who would not pursue relief on their own—is simply inapplicable to cases involving class members who cannot be identified; when such class actions are certified, only a small handful of class members actually receive benefits.

For all of these reasons, this Court's review is warranted to bring needed clarity and uniformity to the standards for class certification.

ARGUMENT

I. Ascertainability Is A Fundamental Prerequisite To Class Certification.

A. Ascertainability is rooted in longstanding due process principles.

1. The "fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). Due process thus requires not only that a plaintiff prove every element of his claim, but also that a defendant be given "'an opportunity to present every available defense.'" *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)); see also, *e.g.*, *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (recognizing that the "right to litigate the issues raised" in a case is "guaranteed * * * by the Due Process Clause").

These due process rights do not change when a lawsuit is brought as a class action rather than an individual one. The class action is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged").

Because due process precludes use of the class action mechanism to alter the substantive rights of the parties to the litigation, federal courts have recognized that Rule 23's requirements must be interpreted to avoid that result. As this Court put it, "a class cannot be certified on the premise that [the de-

fendant] will not be entitled to litigate its * * * defenses to individual claims." *Dukes*, 564 U.S. at 367.

The Court further recognized in *Dukes* that a contrary approach to class certification would violate the Rules Enabling Act (*id.*), which embodies the due process principle that procedural rules cannot "abridge, enlarge or modify any substantive right" (28 U.S.C. § 2072(b)). The Rules Enabling Act's "pellucid instruction that use of the class device cannot abridge any substantive right" bars courts from "giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods*, 136 S. Ct. at 1046, 1048 (quotation marks and alterations omitted); see also *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (quotation marks omitted); *Amchem Prods. Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997)) ("Rule 23's requirements must be interpreted in keeping with * * * the Rules Enabling Act."); *Philip Morris USA, Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) (suggesting that due process is violated if "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action").

2. Requiring plaintiffs to satisfy ascertainability at the certification stage—in other words, to demonstrate an administratively feasible way of identifying the actual members of the putative class—ensures that due process is not sacrificed out of a desire to ease class certification.

Because class actions are nothing more than the sum of their parts—*i.e.*, the individual claims of class members—it is worth examining how this case would look if it had been brought as an individual action. *Cf. Tyson Foods*, 136 S. Ct. at 1047 ("If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce [the expert's] study to prove the hours he or she worked.").

A plaintiff would have to prove that—among other things—he purchased Wesson-brand cooking oil bearing the challenged label. And due process would mandate, in turn, that the defendant be afforded the opportunity to mount a full defense to that factual showing—including cross-examination and other opportunities to test the reliability of the plaintiff's claim. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970) (citing *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 88, 93-94 (1913)).

Because that due process requirement does not change simply because a case has been filed as a class action, a "core concern of ascertainability" is "that a defendant must be able to challenge class membership." *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 309 (2013); see also *id.* at 307 (noting that "[i]f this were an individual claim, a plaintiff would have to prove at trial he purchased WeightSmart" and that a "defendant in a class action" has the same "due process right to raise individual challenges and defenses to claims"). If an individual did not purchase a defendant's product, he cannot be a member of the class and cannot hold the defendant liable.

These questions about class membership are thus critically important. But without a reliable and feasible method for identifying who is in the class, defendants will have no way to challenge individuals' claims of eligibility for relief—short of extensive individualized fact-finding and a mini-trial over each would-be class member's claim of membership. In other words, in the absence of a feasible method for identifying putative class members, "protecting defendants' due-process rights by allowing them to challenge each claimant's class membership" would be "administratively infeasible" and wholly unworkable. *Karhu* v. *Vital Pharms., Inc.*, 621 F. App'x 945, 949 (11th Cir. 2015).

For that reason, the Second, Third, Fourth, and Eleventh Circuits have rightly denied class certification where "determining class membership would require the kind of individualized mini-hearings that run contrary to the principle of ascertainability." *Brecher* v. *Republic of Argentina*, 806 F.3d 22, 26 (2d Cir. 2015); see also *Carrera*, 727 F.3d at 307 (citing *Marcus* v. *BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)); *EQT Prod. Co.* v. *Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *Karhu*, 621 F. App'x at 949-950.

3. Requiring plaintiffs to offer a method for ascertaining the identity of class members also satisfies the due process requirement "that a defendant be able to test the reliability of the *evidence* submitted to prove class membership." *Carrera*, 727 F.3d at 307 (emphasis added).

For instance, to evade ascertainability concerns, plaintiffs often contend that would-be class members can (in theory) identify themselves through affidavits in which the potential class member himself or her-

self simply asserts that he or she purchased a product. But allowing putative class members to establish eligibility through conclusory affidavits, rather than documentary or other tangible evidence, cannot satisfy the ascertainability requirement, because there would be no meaningful way to verify whether each claim is truthful and accurate or for the defendant to challenge those claims that are not—as due process requires.

As the Third Circuit put it, "[f]orcing [defendants] 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." *Marcus*, 687 F.3d at 594. And the Eleventh Circuit echoed that conclusion, holding that "allowing class members to self-identify without affording defendants the opportunity to challenge class membership provides inadequate procedural protection to defendants and implicates their due process rights." *Karhu*, 621 F. App'x at 948 (quotation marks and alterations omitted).

A leading treatise has explained that "[c]ourts have rejected proposals to employ class member affidavits and sworn questionnaires as substitutes for traditional individualized proofs" because such submissions "are, most importantly, not subject to cross-examination." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:6 (13th ed. 2016).

As a matter of common sense, such affidavits are especially unreliable in cases (like this one) involving consumer products, because putative class members often "will have difficulty accurately recalling their purchases" years after the fact. *Carrera*, 727 F.3d at 309. Indeed, the petition explains how plaintiffs' own testimony demonstrates how difficult it is to re-

liably recall the purchase of small-value items years later. Pet. 5-7.

That is just common sense. Imagine asking average persons on the street if they recall not just whether they purchased yogurt, tomato sauce, or batteries three years ago—but also which brand they purchased and how many of each item. The chances that any person would recall such details are extremely low. Yet such products are routinely the subject of consumer class actions in which class membership depends on just those facts.[2]

In short, the difficulties of identification present in this case—and in many other consumer class actions of this kind—make clear that defendants often will have a strong defense to any particular would-be class member's claim of eligibility for monetary relief. Courts should not be permitted to paper over these difficulties in violation of defendants' due process rights.

B. The reasons offered by the court below for rejecting a meaningful ascertainability requirement do not comport with due process.

Although the court of appeals addressed due process and the Rules Enabling Act (see Pet. App. 19a-21a), it failed to take those bedrock principles seriously. None of its justifications for finding those concerns overcome make sense.

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[2] See, *e.g.*, *Poertner* v. *Gillette Co.*, 2014 WL 4162771 (S.D. Fla. 2014) (batteries); *Jones* v. *ConAgra Foods, Inc.*, 2014 WL 2702726 (N.D. Cal. 2014) (tomato products); *Johnson* v. *Gen. Mills, Inc.*, 275 F.R.D. 282 (C.D. Cal. 2011) (yogurt).

First, the Ninth Circuit recognized that it "would be difficult to demonstrate" an administratively feasible way of identifying class members in this case, and that adhering to such an ascertainability requirement would therefore be "outcome determinative"—in other words, it would require reversal of the district court's certification order. Pet. App. 15a. But the court then applied its own outcome-determinative rule, ruling that defendants' due process rights must give way because otherwise "[c]lass actions involving inexpensive consumer goods in particular would likely fail at the outset if administrative feasibility were a freestanding prerequisite to certification." *Id.*

Such policy concerns cannot trump the rules governing class actions, which this Court has long recognized are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-701 (1979); accord *Dukes*, 564 U.S. at 348. A court's policy preference for class actions does not justify superseding a defendant's due process right to challenge the evidence used to prove class membership. Nor may a court expand the substantive rights of plaintiffs (or abrogate a defendant's right to present every available defense) in violation of the Rules Enabling Act.

Moreover, the policy prediction that consumer class-actions related to the purchase of small-dollar items will die out is highly unlikely to come to pass: Commentators have been prophesizing the demise of the class action for decades, yet experience has

shown otherwise.[3] And as the petition points out, low-value consumer class actions are often ascertainable—including under the Third Circuit's standard. Pet. 35 (citing *Byrd* v. *Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015); *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380 (3d Cir. 2015)). Finally, this policy concern is misguided in any event, because certifying an unascertainable class of consumers predictably delivers little to no benefit to the members of the class. See pages 18-21, *infra*.

Second, the court below suggested that defendants can challenge absent class members' claims "[a]t the claims administration stage," *after* a class has been certified and liability determined. Pet. App. 21a-22a. But that approach—which boils down to "certify first, identify later"—is fundamentally flawed for multiple reasons.

To begin with, the court of appeals' approach improperly assumes that litigated class judgment is the equivalent of a class settlement. Specifically, the Ninth Circuit's discussion of claims administration is a direct quote from the Seventh Circuit's opinion in *Mullins* v. *Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), which in turn relied principally on procedures endorsed by the *Manual for Complex Litigation* to verify class membership, weed out fraudulent claims, and distribute class benefits. *Id.* at 667 (citing *Manual for Complex Litigation* § 21.66 (4th ed. 2004)).

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[3] See, *e.g.*, Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 Cornell L. Rev. 858, 858 (1995) (noting that "[i]n 1988 the New York Times reported that class actions appeared to be dying" and that they had "kind of petered out") (quotation marks omitted).

But the Manual's discussion of these claims procedures occurs in addressing how to implement class *settlements*.

When a putative class action is settled, the parties often agree that a claims administrator may make judgments to determine whether a claimant truly is a class member who qualifies for benefits and to assess whether any submitted claims are fraudulent. That agreement reflects one of the compromises of settling a case: Defendants trade away the due process right to cross-examine each putative class member in exchange for certainty, finality, and—most significantly—a substantial discount on the potential liability claimed by the plaintiff and his or her counsel.

In a *litigated* case, by contrast, defendants' due process rights cannot be jettisoned. Without the defendant's agreement, administrative determinations by an outside third party cannot substitute for a defendant's right to cross-examine its accusers and to "litigate its * * * defenses to individual claims." *Dukes*, 564 U.S. at 367.

In addition, such determinations cannot serve as an adequate substitute for a defendant's right to *judicial* resolution of factual disputes. This Court has recognized that no matter how complex the case or numerous the parties, a district court's reliance on a non-Article III entity to adjudicate fundamental issues without party consent amounts to "an abdication of the judicial function depriving the parties of a trial before the court on basic issues involved in the litigation." *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957) (concluding that writ of mandamus was appropriate where district court had referred case to a special master for trial).

Finally, postponing the resolution of ascertainability issues until after a class is certified will almost always mean that those issues are never resolved at all—after certification, the overwhelmingly likely result is settlement, not further litigation on the merits. See pages 16-18, *infra*. Thus, the approach embraced by the decision below forces defendants to settle even if they have valid objections to putative class members' membership in the class, effectively negating their due process right to raise "every available defense." *Lindsey*, 405 U.S. at 66 (quotation marks omitted).

Third, the court below noted that plaintiffs had proposed to avoid the inconvenience of identifying actual class members by calculating the defendant's total liability on an aggregate basis based on total sales—an approach sometimes referred to as "fluid recovery." See Pet. App. 23a-24a. In a litigated class action (as opposed to a settlement), however, fluid recovery has been "repeatedly rejected." 2 *McLaughlin on Class Actions*, *supra*, § 8:16.

The reason for this rejection is simple: "[t]he purported substitution of the 'class as a whole' for its individual members on damages issues would almost inevitably violate Rule 23, due process, the Seventh Amendment and the Rules Enabling Act." *Id.*; accord 32B *Am. Jur. 2d Federal Courts* § 1886 ("courts have rejected the 'fluid class' recovery concept as a method of reducing the manageability problems involved in a class action"). As the Second Circuit has explained, "[w]hen fluid recovery is used to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, *resulting in a due process violation*." *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 232

(2d Cir. 2008) (emphasis added), *abrogated in part on other grounds by Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

Relatedly, members of this Court have recognized that a class cannot be certified under standards that provide a "lump-sum" damages award to a class that includes individuals not eligible to recover: "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring). In other words, courts must "devise a means of distributing the aggregate award only to injured class members." *Id.* at 1051. Yet that is impossible when classes are certified in a way that individual class members cannot be feasibly identified at all.

II. The Decision Below Harms Businesses Without Benefiting Absent Class Members.

Decisions such as the ruling below not only violate settled due process principles—they inflict severe burdens on businesses while offering virtually nothing to the vast majority of potential class members. These real-world consequences demonstrate the compelling need for this Court's intervention.

A. Certification of unascertainable classes will lead to abusive lawsuits designed to extract *in terrorem* settlements.

Class certification is "often the most significant decision in * * * class-action proceedings." *Roper*, 445 U.S. at 339. It is the main event because 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." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1976).

The plaintiffs' bar is well-aware of the coercive power of class certification. Few defendants continue to litigate cases after classes are certified; at that point, the pressure on defendants to settle is often overwhelming. And to make matters worse, that pressure is overwhelming even if the plaintiffs' allegations lack merit. *See*, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (explaining the "risk of 'in terrorem' settlements that class actions entail"; "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"); *Shady Grove Orthopedic Assocs.*, 559 U.S. at 445 n.3 (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("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.").

If the decision below is permitted to stand, it is thus inevitable that the plaintiffs' bar will flood courts in the Ninth (or Sixth or Seventh) Circuits with putative class actions brought on behalf of sprawling classes of unidentifiable purchasers of a defendant's products in an effort to extract a class-wide settlement. As one set of commentators has put it, the decision below "will likely encourage plaintiffs to file more food-labeling class actions in the Ninth Circuit, which is already known as the 'Food Court' for its high volume of food-related lawsuits." Malerie Ma Roddy & Amy M. Rubenstein, *Food Fight: More*

Labeling Litigation in 2017, Nat'l L. Rev. (Feb. 6, 2017), available at https://perma.cc/J3NN-3CAZ.

Businesses' exposure to unascertainable class actions—and inevitable settlement—should not turn on the ability of plaintiffs to shop for a forum that applies lax certification standards. This Court's review is essential to bring certainty and uniformity to the standards for class certification in the federal courts.

B. Certification of unascertainable classes yields no benefit at all to the overwhelming majority of absent class members.

The court below appeared to accept on faith that there is an inherent benefit to certification of "[c]lass actions involving inexpensive consumer goods." Pet. App. 15a; see also pages 11-13, *supra*.

But that assumption is contradicted by empirical evidence that the majority of absent class members obtain no benefit at all from consumer class actions—and that is especially so when the members of a class are not ascertainable and therefore direct notice to absent class members is not possible.

The court of appeals itself recognized that there are "consistently low participation rates in consumer class actions." Pet. App. 18a-19a (citing Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 119 (2007)); see also *Mullins*, 795 F.3d at 667 (citing the same article in pointing out that "only a tiny fraction of eligible claimants ever submit claims for compensation in consumer class actions"). The cited article observed the trend—even a decade ago—towards "shockingly low participation rates" in consumer class action settlements. Leslie, *supra*, at

120; see also, *e.g.*, Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique*, at 43, Mercatus Working Paper (Aug. 2015), available at https://perma.cc/ZE6B-MJ9Z ("When it comes to consumer compensation under class action settlements, previous research has found * * * claims rates often below 5% in large class actions where consumers have to fill out forms to receive compensation.").

That trend has only continued to the present—and the claims rate is particularly miniscule when members of the class cannot be identified and thus will not receive direct notice (for example, by mail or e-mail). In connection with the settlement of a class action involving purchasers of Duracell batteries, a senior consultant at one 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) (emphasis added), available at https://perma.cc/45L2-7498. 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.* And the median claims rate for those cases was a miniscule ".023%"—which is roughly 1 claim per *4,350* class members. *Id.*

To put it another way, when class actions like the one here are settled—*i.e.*, mine-run cases involving products for which class members are not readily identifiable and direct notice is largely impossible—

approximately ***99.98%*** of class members receive *no benefit at all*. The author of another recent empirical study on class actions confirmed that the McComb declaration is "perhaps the most compelling piece of recent evidence" about claims rates in class-action settlements, because such information is rarely made "publicly available." Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions*, at 17-18, Emory L. Studs. Research Paper No. 16-402 (Feb. 1, 2016), available at https://ssrn.com/abstract=2726905; see also *id.* at 24 ("[F]ew eligible class members—less than one percent in many cases—actually pursue claims to receive the modest compensation.").

And on the rare occasions when some data is publicly available on consumer class-action settlements made without direct notice to absent class members—for instance, when the parties or the settlement administrator provide the number of claims submitted by the time of final approval—the data bear out the exceedingly low participation rates identified in the McComb declaration. For example:

- *Miller* v. *Basic Research, LLC*, No. 07-cv-871 (D. Utah) approved a settlement of a nationwide class of purchasers of diet pills. A week before final approval, there had been only ***88*** claims submitted by class members, out of at least hundreds of thousands of purchasers. *Id.* Dkt. No. 321-1 (July 21, 2015); *id.* Dkt. No. 195 (Mar. 15, 2011).
- The claims rate in a settlement of a consolidated nationwide class action of individuals who purchased snack foods between 2007 and 2014 was so low that the parties had to increase the recovery per claimed purchase by over 800%: $4.30 per purchase rather

than the $0.50 originally called for in the settlement. See *Astiana* v. *Kashi Co.*, No. 11-cv-1967 (S.D. Cal.), Dkt. Nos. 238, 242. Earlier in the litigation, California-only classes were certified over the defendant's objections that the classes were unascertainable. *See* 291 F.R.D. 493, 500-501 (S.D. Cal. 2013).

- In a nationwide class action challenging the advertising of joint health supplements, there were only 3,500 claims at the time of the final approval hearing, out of 8,000,000 total product sales during the class period. *Hazlin* v. *Botanical Labs., LLC*, No. 13-cv-618 (S.D. Cal. Mar. 23, 2015), Dkt. No. 55, at 8-12. Even on counsel's assumption that each class member may have purchased "three or four products" (*id.* at 8), that is still a response rate of at most 0.175% (3,500/2,000,000).

In short, the available data confirm that the only true beneficiaries of the certification and settlement of consumer class actions in general—and especially of unascertainable classes, which represent the worst kind of lawyer-driven class action abuse—are the lawyers (both on the plaintiffs' and the defense side).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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