

15-549
No. 15-

Supreme Court, U.S.
FILED

OCT 26 2015

OFFICE OF THE CLERK

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

PETITION FOR A WRIT OF CERTIORARI

Daniel S. Silverman
Ari N. Rothman
Benjamin E.
Horowitz
VENABLE LLP
575 7th Street N.W.
Washington, D.C.
20004
(202) 344-4220

E. Joshua Rosenkranz
Counsel of Record
Robert Loeb
Christopher J. Cariello
Haley E. Jankowski
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, New York
10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

QUESTION PRESENTED

To certify a class under Federal Rule of Civil Procedure 23, the class must be "ascertainable." This requirement has been adopted by every Circuit to consider it. A plurality of the circuits holds that to satisfy ascertainability, the plaintiff must show that class membership can be ascertained through reliable and administratively feasible methods. Two circuits, including the Seventh Circuit in this case, reject that requirement and hold that it is enough to simply define the class by objective criteria, even if those criteria cannot actually be used to ascertain membership. The question presented is:

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?

CORPORATE DISCLOSURE STATEMENT

Petitioner Direct Digital, LLC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
OPINIONS AND ORDERS BELOW	4
JURISDICTION	5
RULES INVOLVED	5
STATEMENT OF THE CASE	5
Mullins Files A Consumer Class Action Against Direct Digital	5
The District Court Certifies A Class And The Seventh Circuit Affirms.	7
REASONS FOR GRANTING THE WRIT	9
I. This Case Presents A Recurring Question That Has Intractably Divided Lower Courts Across The Country.	9
II. The Approach Taken By The Seventh And Sixth Circuits Conflicts With This Court's Recent Precedents On Class Certification And Undermines Fundamental Due Process Interests	19
III. This Case Is An Ideal Vehicle For Resolving The Question Presented.	27
CONCLUSION	28

APPENDIX A	Seventh Circuit Opinion (July 28, 2015)	1a
APPENDIX B	District Court Order Granting in Part and Denying in Part Plaintiff's Motion to Certify the Class (Sept. 30, 2014)	42a
APPENDIX C	Federal Rule of Civil Procedure 23	51a

TABLE OF AUTHORITIES

Page(s)

Federal Cases

<i>Adami v. Cardo Windows, Inc.</i> , 299 F.R.D. 68 (D.N.J. 2014)	16
<i>Am. Express Co. v. Italian Colors Rest.</i> , 133 S. Ct. 2304 (2013).....	27
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011).....	20
<i>Behrend v. Comcast Corp.</i> , 655 F.3d 182 (3d Cir. 2011)	22
<i>Bezdek v. Vibram USA Inc.</i> , 79 F. Supp. 3d 324 (D. Mass. 2015)	18
<i>Bobryk v. Durand Glass Mfg. Co.</i> , 50 F. Supp. 3d 637 (D.N.J. 2014)	15
<i>Bussey v. Macon Cnty. Greyhound Park, Inc.</i> , 562 F. App'x. 782 (11th Cir. 2014)	11, 14
<i>Byrd v. Aaron's Inc.</i> , 784 F.3d 154 (3d Cir. 2015)	8
<i>Califano v. Yamasaki</i> , 442 U.S. 682 (1979).....	10
<i>Carrera v. Bayer Corp.</i> , 727 F.3d 300 (3d Cir. 2013)	<i>passim</i>

<i>Clark v. Bally's Park Place, Inc.,</i> 298 F.R.D. 188 (D.N.J. 2014)	16
<i>Coll. of Dental Surgeons of P.R. v.</i> <i>Conn. Gen. Life Ins. Co.,</i> 585 F.3d 33 (1st Cir. 2009)	11
<i>Comcast Corp. v. Behrend,</i> 133 S. Ct. 1426 (2013).....	4, 20, 22, 23, 24, 25
<i>In re ConAgra Foods, Inc.,</i> 302 F.R.D. 537 (C.D. Cal. 2014)	18
<i>Coopers & Lybrand v. Livesay,</i> 437 U.S. 463 (1978).....	20
<i>Crosby v. Social Sec. Admin. of the U.S.,</i> 796 F.2d 576 (1st Cir. 1986)	11, 15
<i>Daniels v. Hollister Co.,</i> 440 N.J. Super. 359, 113 A.3d 796 (App. Div. 2015)	18
<i>DeBremaecker v. Short,</i> 433 F.2d 733 (5th Cir. 1970).....	11
<i>Deposit Guar. Nat'l Bank v. Roper,</i> 445 U.S. 326 (1980).....	20
<i>Ebin v. Kangadis Food Inc.,</i> 297 F.R.D. 561 (S.D.N.Y. 2014).....	19
<i>Eisen v. Carlisle & Jacquelin,</i> 417 U.S. 156 (1974).....	11

<i>EQT Prod. Co. v. Adair</i> , 764 F.3d 347 (4th Cir. 2014).....	15
<i>Forcellati v. Hyland's, Inc.</i> , No. CV 12-1983-GHK MRWX, 2014 WL 1410264 (C.D. Cal. Apr. 9, 2014).....	18
<i>Gen. Tel. Co. of Sw. v. Falcon</i> , 457 U.S. 147 (1982).....	13, 26
<i>Guido v. L'Oreal, USA, Inc.</i> , Nos. 11-1067, 11-5465, 2013 WL 3353857 (C.D. Cal. July 1, 2013).....	18
<i>Hayes v. Wal-Mart Stores, Inc.</i> , 725 F.3d 349 (3d Cir. 2013)	10, 12
<i>In re Initial Pub. Offerings Sec. Litig.</i> , 471 F.3d 24 (2d Cir. 2006)	11
<i>Jenkins v. White Castle Mgmt. Co.</i> , No. 12 CV 7273, 2015 WL 832409 (N.D. Ill. Feb. 25, 2015)	15
<i>John v. Nat'l Sec. Fire & Cas. Co.</i> , 501 F.3d 443 (5th Cir. 2007).....	10
<i>Jones v. ConAgra Foods, Inc.</i> , No. C 12-01633 CRB, 2014 WL 2702726 (N.D. Cal. June 13, 2014)	15
<i>Karhu v. Vital Pharmaceuticals, Inc.</i> , No. 14-11648, 2015 WL 3560722 (11th Cir. June 9, 2015).....	14

<i>Lilly v. Jamba Juice Co.</i> , 308 F.R.D. 231 (N.D. Cal. 2014).....	18
<i>Lindsey v. Normet</i> , 405 U.S. 56 (1972).....	21
<i>Little v. T-Mobile USA, Inc.</i> , 691 F.3d 1302 (11th Cir. 2012).....	10
<i>Marcus v. BMW of N. Am., LLC</i> , 687 F.3d 583 (3d Cir. 2012)	2, 10, 12, 13
<i>McCrary v. Elations Co., LLC</i> , No. EDCV 13-00242 JGB (OPx), 2014 WL 1779243 (C.D. Cal. Jan. 13, 2014).....	18
<i>Mullins v. Direct Digital, LLC</i> , 795 F.3d 654 (7th Cir. 2015).....	4, 18, 26
<i>In re Nexium Antitrust Litig.</i> , 777 F.3d 9 (1st Cir. 2015).....	15
<i>In re POM Wonderful LLC</i> , No. ML 10-02199 DDP RZX, 2014 WL 1225184 (C.D. Cal. Mar. 25, 2014).....	15
<i>Rahman v. Mott's LLP</i> , No. 13-cv-03482-SI, 2014 WL 6815779 (N.D. Cal. Dec. 3, 2014)	18
<i>Rikos v. Procter & Gamble Co.</i> , 799 F.3d 497 (6th Cir. 2015).....	3, 17

<i>Sethavanish v. ZonePerfect Nutrition Co.</i> , No. 12-2907-SC, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014)	16
<i>Simer v. Rios</i> , 661 F.2d 655 (7th Cir. 1981).....	11, 12
<i>Stalley v. ADS Alliance Data Sys., Inc.</i> , 296 F.R.D. 670 (M.D. Fla. 2013)	16
<i>Stewart v. Beam Global Spirits & Wine, Inc.</i> , No. CIV. 11-5149 NLH/KMW, 2014 WL 2920806 (D.N.J. June 27, 2014)	15
<i>Taylor v. Sturgell</i> , 553 U.S. 880 (2008).....	4, 10, 21
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011).....	<i>passim</i>
Federal Statutes	
28 U.S.C. § 1254(1).....	5
28 U.S.C. § 2072(b).....	21
Rules	
Fed. R. Civ. P. 23.....	5
Fed. R. Civ. P. 23(b)	8
Fed. R. Civ. P. 23(b)(3)	1, 5, 8, 22
Fed. R. Civ. P. 23(c)(1)(A)	5, 25, 27

Fed. R. Civ. P. 23(c)(1)(B)	11
Fed. R. Civ. P. 23(f)	8
Other Authorities	
Joseph M. McLaughlin, <i>McLaughlin on Class Actions</i> § 4:2 (11th ed. 2014).....	11, 12
5 James Wm. Moore et al., <i>Moore's Federal Practice</i> ¶ 23.21[1].....	11
Richard A. Nagareda, <i>Class Certification in the Age of Aggregate Proof</i> , 84 N.Y.U. L. Rev. 97 (2009).	20
William B. Rubenstein, <i>Newberg on Class Actions</i> § 3:2 (5th ed. 2015).....	11, 12
7 Wright & Miller, <i>Federal Practice and Procedure</i> (3d ed., 2013) § 1760	11

INTRODUCTION

We've all been there: standing in the pharmacy, feeling a cold coming on, scanning a couple dozen options—different brands, different active ingredients, different dosages within brands, combinations of Echinacea, Vitamin C, and Zinc. Eventually, you settle on one and take it periodically during cold season. Now fast forward two years. Your colleague tells you that she has just joined a class action she learned about on the internet alleging that a company sold an Echinacea product with only a trace amount of the active ingredient in it. She sends you a link to a simple online opt-in form. But do you remember what you chose that day? You didn't hang onto the receipt and you haven't the foggiest idea what happened to that bottle from two winters ago. Do you remember what brand it was? Which product? Whether or when you got sick that winter, and how bad your symptoms were?

In many consumer class actions filed in the federal courts, plaintiffs seek to certify classes whose claimed membership would be determined based on nothing more than a consumer's vague recollections. In the absence of proof of purchase or other records showing who purchased what product and when, plaintiffs suggest that class membership can be established through self-identifying affidavits—simple boilerplate recitations, untested by cross-examination, that claim a place in the class. And inevitably, of course, this method carries not only the risk of foggy memory, but can also tempt outright fraud. If such claims were brought individually, a defendant would have a due process right to test whether the plaintiff actually purchased the defend-

ant's product. That fundamental right cannot be compromised for the convenience of class plaintiffs and their counsel.

A plurality of the federal courts of appeals agrees. Led by the Third Circuit, they recognize that a class cannot be certified under Rule 23 unless its membership is truly "ascertainable." This plurality requires a plaintiff to make a basic showing that class membership can be ascertained in a manner that is reliable and administratively feasible, and to do so at "an early practicable time" after a person sues, as Rule 23 contemplates. As the Third Circuit has explained, the methods proposed by the class plaintiff must be reliable because "[f]orcing [a 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." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012); see *Carrera v. Bayer Corp.*, 727 F.3d 300, 303-05 (3d Cir. 2013). And they must be administratively feasible because that is the whole point of class adjudication—"[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Marcus*, 687 F.3d at 593. This simple showing thus ensures class members are ascertainable in a way that is consistent with due process and the goals of class adjudication. And, it does so *before* a class is certified and before the action is sent hurtling toward a settlement that forces the defendant to abandon meritorious defenses or a trial that could threaten the defendant's very existence.

But two circuits recently rejected that approach. Here, the Seventh Circuit certified a class of all individuals who purchased a health supplement called Instaflex, without requiring class plaintiff Vince Mullins to make *any* showing that these individuals could actually be ascertained in a feasible and reliable manner. The court explicitly acknowledged the other circuits that would require such an ascertainability showing, but chose to reject their approach.

The Seventh Circuit's decision leaves Petitioner Direct Digital facing potentially huge damages from the certified class, with no assurances that it will ever be able to test whether any of the would-be class members actually purchased Instaflex. The only winner, of course, is not the class members—who stand to recover little, if they can be identified at all—but class *counsel*—who has now been handed extraordinary leverage to negotiate a settlement and its fee.

The divide sparked by the Seventh Circuit has only deepened since. Less than a month after the Seventh Circuit decided this case, the Sixth Circuit too declined to require any showing of a reliable and feasible method for ascertaining class members. *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015). And dozens of district courts across the country have waded into the debate, generating mass confusion in the class action bar concerning the proper standard. This intractable conflict on a frequently recurring question calls for this Court's review.

The Seventh Circuit's minority approach not only conflicts with the plurality of its sister circuits, it

also conflicts with this Court’s recent precedents, and undermines class action defendants’ due process rights. In recent cases—most notably *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013)—this Court has insisted on a “rigorous” Rule 23 analysis prior to certification. The Seventh Circuit ignores that directive. In doing so, it defers any opportunity for the defendant to challenge the appropriateness of a class action until after settlement or trial, which is far too late in the day to matter. Rule 23’s conditions are “grounded in due process,” *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)—they cannot be so easily cast aside. And certainly they cannot be cast aside, as the Seventh Circuit did, based on a judicial policy preference in favor of exempting small-dollar consumer class actions from Rule 23’s standards.

Finally, this case is an ideal vehicle for resolving the question. The Seventh Circuit clearly rejected any requirement of a meaningful showing of ascertainability prior to certification. It relied on no alternate ground—indeed, Mullins did not offer one—and made no attempt to distinguish the rules of other circuits. This case is therefore an ideal opportunity for this Court to resolve whether Rule 23’s ascertainability requirement entails a showing at the certification stage that class members can be ascertained in a fair and reliable manner. This Court should grant the petition and hold that it does.

OPINIONS AND ORDERS BELOW

The court of appeals’ opinion (Pet. App. 1a-41a) is reported at 795 F.3d 654 (7th Cir. 2015). The dis-

trict court's order granting-in-part and denying-in-part Mullins's motion for class certification (Pet. App. 42a-50a) is not published in the *Federal Reporter* but is available at 2014 WL 5461903 (N.D. Ill. Sept. 30, 2014).

JURISDICTION

The court of appeals entered judgment on July 28, 2015. Pet. App. 1a. On August 18, 2015, the court of appeals granted Direct Digital's motion to stay the mandate pending this Court's review. *Mullins v. Direct Digital LLC*, 15-1776 (7th Cir.), D.E. 29. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

This case involves Federal Rule of Civil Procedure 23(b)(3) and Rule 23(c)(1)(A), which are reproduced at Pet. App. 51a-52a.

STATEMENT OF THE CASE

Mullins Files A Consumer Class Action Against Direct Digital.

Vince Mullins says that in the Fall of 2012, he began to experience occasional "discomfort in [his] knees" brought on by jogging. 4R160-63.¹ Mullins did not seek medical treatment. But, Mullins says, he remembered that his former college roommate had

¹ Citations to the record before the Seventh Circuit, *Mullins v. Direct Digital LLC*, 15-1776 (7th Cir.), D.E. 5, begin with volume number, followed by "R," followed by page number.

“mentioned” a supplement called “glucosamine” while “talking about working out.” 4R169-70. The roommate had said that glucosamine helps with “cartilage repair or ... stiffness.” *Id.* So, sometime around “February 2013”—Mullins does not remember the date—he went to a nutrition store to purchase a glucosamine supplement. 2R49.

Direct Digital, LLC markets and sells a supplement called “Instaflex Joint Support” (“Instaflex”). 4R33. Instaflex is designed to relieve joint discomfort through a formula combining glucosamine with other ingredients. 4R33-34. The “Joint Support” supplement is not the only Instaflex-brand supplement Direct Digital markets—for example, there is also “Instaflex Bone Support,” “Instaflex Muscle Support,” and “Instaflex Multivitamin.” 4R34. These products are sold throughout the country at dozens of third-party brick-and-mortar retailers, like GNC, Walgreens, Vitamin Shoppe, Rite Aid, and Duane Reade. 4R33. And these retailers typically sell their different brands of supplements right next to one another. *E.g.*, 4R167. It would thus be common to see a retailer shelve other glucosamine-based supplements right next to Instaflex. Unsurprisingly, many of these supplements have similar names, like “Tri-Flex,” “TripleFlex,” or “Osteo Bi-Flex,” and are packaged similarly. 4R34.

Mullins says that he remembers purchasing Instaflex from a GNC. 4R167. He recalls that there were about “10 to 15” other options on the shelves. *Id.* Mullins, however, has no proof of purchase. He did not save the receipt. He has no credit card record because he claims that he paid with cash. 4R175-76. He has no other evidence confirming the purchase.

Nor did he tell anyone that he bought Instaflex. There are no medical records even suggesting that he has any condition, let alone a prescription or indication that Mullins would or did use Instaflex to treat it. 4R176. He does not even have the bottle that he claimed to have purchased; he says that two weeks after—in February 2013—he discarded it. 4R177.

Around the beginning of March of 2013, Mullins received a phone call from an old family friend named Joe Siprut. 4R185. Siprut is a lawyer who specializes in bringing class actions. 4R186. Siprut “mentioned” to Mullins that he was “looking at different cases regarding glucosamine and asked if [Mullins] had taken any in the past.” *Id.* Mullins said that he had taken Instaflex. *Id.*

Days later, on March 8, 2013, Mullins, represented by Siprut, filed this action seeking to assert a class action against Direct Digital. 1R5-19. The complaint alleged that statements on Instaflex’s product packaging—for example, that Instaflex is “scientifically formulated” to “relieve discomfort”—are not true. 1R10. Mullins, on behalf of all others similarly situated, claimed that these statements violate the Illinois Consumer Fraud Act. 1R14-15.

The District Court Certifies A Class And The Seventh Circuit Affirms.

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, arguing, among other things, that Mullins had failed

to satisfy Rule 23(b)'s ascertainability requirement. Citing authority from the Third and Eleventh Circuits, Direct Digital maintained that Mullins's proposed class could not be certified because he had made no showing that the members of the class could be feasibly and reliably ascertained. Pet. App. 45a-47a.

In response, Mullins did not attempt to show that his proposed class could be identified at all, let alone feasibly and reliably. Instead, he argued that the court should certify his class as long as the class was defined by "objective criteria"—even if there was no way of actually applying those criteria to ascertain class membership in a manner that is both reliable and feasible. The district court accepted Mullins's argument and certified a multi-state damages class. Pet. App. 50a. Its two-sentence ascertainability analysis contained no finding as to 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 under Rule 23(f). After full briefing and argument, the court of appeals affirmed. The court recognized that Rule 23(b)(3) carries an ascertainability condition "requir[ing] that classes be defined clearly and based on objective criteria." Pet. App. 7a. The court also acknowledged the authorities from the Third and Eleventh Circuits, requiring not just "objective criteria" defining the class, but also "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 court, however, expressly rejected that rule.

In rejecting the ascertainability requirement imposed by the other circuits, the Seventh Circuit held that a class plaintiff has no obligation at the class certification stage 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,” attempting to solve any issues of class member identification then. Pet. App. 18a-19a (emphasis added). The court believed that requiring a plaintiff to show before trial that class members could be feasibly and reliably ascertained was too burdensome to do before trial, and should not be imposed prior to certification. Pet. App. 14a-15a.

Direct Digital now petitions for review.

REASONS FOR GRANTING THE WRIT

I. This Case Presents A Recurring Question That Has Intractably Divided Lower Courts Across The Country.

This case presents the Court with an opportunity to resolve the established circuit conflict over whether a court can certify a class under Rule 23, even where a plaintiff makes no attempt to show that the class members can be ascertained through feasible and reliable means. A plurality of the courts of appeals—led by the Third Circuit—requires the plaintiff to demonstrate that the putative class is not only

objectively definable in theory, but also feasibly and reliably ascertained.

The Seventh Circuit in this case, joined recently by the Sixth Circuit, expressly rejected the plurality's requirement of such a showing. They hold that a class can be certified without any showing that the membership of the class can be ascertained in a manner that is both as reliable as a defendant would be entitled to in an individual action and as efficient as would justify class adjudication. District courts are also intractably divided on this question. The conflict can be resolved only by this Court's review.

A. "The 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 Stores, Inc. v. Dukes*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To justify a departure from the ordinary rule, the class plaintiff bears the burden of showing that class-wide adjudication of claims is appropriate. *Id.* The conditions for making this showing are contained in Rule 23. This Court has recognized Rule 23's "procedural protections" as "grounded in due process." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008).

As a threshold matter, all courts agree in some sense that a class should not be certified unless its membership is ascertainable.² This stands to reason.

² See *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012); *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012); *John v. Nat'l Sec. Fire & Cas. Co.*, 501

Rule 23(c)(1)(B) requires that a certification order “define the class.” In order to evaluate whether that class satisfies Rule 23’s other requirements—commonality, for example, or predominance—a court must be able to determine whom and what the class purports to represent. *See Simer v. Rios*, 661 F.2d 655, 687 (7th Cir. 1981); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam); William B. Rubenstein, *Newberg on Class Actions* § 3.2 (5th ed. 2015). That is, the “class must be currently and readily ascertainable.” *Newberg on Class Actions* § 3:2 (5th ed. 2015).

According to the leading treatises on class actions, the ascertainability requirement has two related components. One is that plaintiffs must define their proposed class using “objective criteria.” *Newberg on Class Actions* § 3.3; Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:2 (11th ed. 2014); 5 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 23.21[1]; 7 Wright & Miller, *Federal Practice and Procedure* § 1760 at p. 582). A class defined by refer-

F.3d 443, 445 (5th Cir. 2007); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006); *Crosby v. Social Sec. Admin. of the U.S.*, 796 F.2d 576, 580 (1st Cir. 1986); *Simer v. Rios*, 661 F.2d 655, 687 (7th Cir. 1981); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974); *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 F. App’x. 782, 787 (11th Cir. 2014) (unpublished); *Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 41-42 (1st Cir. 2009); William B. Rubenstein, *Newberg on Class Actions* § 3:3 (5th ed. 2015) (a “class must be currently and readily ascertainable”); Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:2 (11th ed. 2014).

ence to, for example, class members' state of mind would fail this requirement because state of mind is not an objective fact that could be applied to ascertain whether a purported class member belongs. *See, e.g., Simer*, 661 F.2d at 669-70 (7th Cir. 1981).

The second component—and the one at issue in this case—requires that the plaintiff show an “administratively feasible” method for reliably identifying class members without requiring “much, if any, individual factual inquiry.” *Newberg on Class Actions* § 3:3. If, for example, individualized mini-trials are necessary to determine class membership, the purposes of class adjudication would be frustrated, and class certification would be inappropriate.

Thus, the proper ascertainability standard requires that before a class is certified, the plaintiff must (a) define the class with objective facts, and (b) show that these objective facts can actually be applied, consistent with the administrative efficiencies expected from a class action, to reliably ascertain class membership.

B. The clearest articulation of this standard can be found in a trilogy of Third Circuit cases: *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 latest of the three, *Carrera*, illustrates the standard as it has developed in the Third Circuit. In *Carrera*, plaintiff Carrera alleged that Bayer falsely claimed its dietary supplement enhanced metabolism. 727 F.3d at 304. Despite the unavailability of

any documentary proof of purchases, the district court certified the class. *Id.* On appeal, Bayer contested certification on the basis that class members were not ascertainable. *Id.* at 303. Carrera countered by arguing two ways the court could ascertain the class: (1) class members could submit affidavits attesting to their purchase of the supplement, and (2) those affidavits could be screened to identify potentially fraudulent claims. *Id.* at 304. The court of appeals held that the putative class was not ascertainable and vacated its certification. *Id.* at 312.

The Third Circuit began its analysis by recognizing the longstanding certification requirement that a class “be currently and readily ascertainable based on objective criteria.” *Id.* at 305 (quoting *Marcus*, 687 F.3d at 593). It recognized 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 court of appeals then further explained the basis for the rule: “A defendant in a class action has a 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. That right, moreover, includes the ability “to challenge the proof used to demonstrate class membership.” *Id.* At the same time, the method chosen to guarantee that opportunity must also preserve “the efficiencies expected in a class action.” *Id.* at 305 (citation omitted). If it would necessitate “individualized fact-

finding or mini-trials,” class adjudication of claims would simply not be appropriate. *Id.*

Carrera’s showing could not pass muster. Because there were no purchase or other records to ascertain class members, he proposed ascertaining class claimants purely by the claimants’ own affidavits. *Id.* at 309. But the reliability of such affidavits was seriously in question because of the high likelihood that many class members “w[ould] have difficulty accurately recalling their purchases of WeightSmart,” or worse, might be deliberately untruthful. *Id.* In that context, the court of appeals concluded that Carrera’s proposed method was not sufficiently reliable and would not safeguard Bayer’s right to challenge class membership. *Id.*

Other Circuits have followed the Third Circuit’s rule. The Eleventh Circuit recently applied the Third Circuit’s ascertainability analysis in *Karhu v. Vital Pharmaceuticals, Inc.*, No. 14-11648, 2015 WL 3560722, at *2-4 (11th Cir. June 9, 2015) (unpublished). In *Karhu*, the plaintiff alleged that he had purchased a dietary supplement in reliance on defendant’s false advertising. *Id.* at *1. The court affirmed the district court’s decision that the proposed class was not ascertainable: “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; see also *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 F. App’x 782, 788 (11th Cir. 2014) (holding that the class should not be certi-

fied because the plaintiffs had not shown how class members could be feasibly ascertained).

The Fourth and First Circuits have imposed similar requirements as well. The Fourth Circuit explained in *EQT Production Co. v. Adair* that “[it] ha[s] repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be ‘readily identifiable.’” 764 F.3d 347, 358 (4th Cir. 2014) (citation omitted). The *EQT* court also cited the Third Circuit trilogy, signaling its accord. *Id.* Meanwhile, in *In re Nexium Antitrust Litigation*, despite certifying the class, the First Circuit explained the need to ensure at the certification stage that the mechanisms for substantiating a would-be claimant’s bona fides 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); see also *Crosby v. Soc. Sec. Admin. of U.S.*, 796 F.2d 576, 580 (1st Cir. 1986) (noting that a “description of [a] class must be sufficiently definite so that it is administratively feasible to determine whether a particular individual is a member”). And numerous district courts have expressly followed the Third Circuit’s standard, too.³

³ *E.g.*, *Jenkins v. White Castle Mgmt. Co.*, No. 12 CV 7273, 2015 WL 832409, at *3-4 (N.D. Ill. Feb. 25, 2015); *Bobryk v. Durand Glass Mfg. Co.*, 50 F. Supp. 3d 637, 644 (D.N.J. 2014); *Stewart v. Beam Global Spirits & Wine, Inc.*, No. CIV. 11-5149 NLH/KMW, 2014 WL 2920806, at *2-4 (D.N.J. June 27, 2014); *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726, at *8-11 (N.D. Cal. June 13, 2014), *appeal docketed*, No. 14-16327 (9th Cir. July 15, 2014); *In re POM Wonderful*

C. Within the last few months, two circuits have rejected the plurality's approach to ascertainability. The first is the Seventh Circuit in this case. As detailed above, Mullins, the class plaintiff, claims to remember that he purchased Instaflex, a glucosamine-based supplement, from a shelf with 10 to 15 other glucosamine-based supplements. *Supra* 5-7. But he claims to have paid in cash and to have thrown away his receipt, so he has no record or other proof of the purchase. He cannot even produce the bottle he asserts he bought. His own membership in the class is thus based entirely on his word and recollection.

When Direct Digital questioned whether there was a feasible and reliable method for ascertaining class members, Mullins responded that none was necessary—that it was perfectly fine to have an entire class with members identified by their own say-so. The district court agreed and granted certification. Direct Digital appealed, insisting that before a class was certified, the district court should have examined whether there was a feasible and reliable

LLC, No. ML 10-02199 DDP RZX, 2014 WL 1225184, at *5 (C.D. Cal. Mar. 25, 2014); *Clark v. Bally's Park Place, Inc.*, 298 F.R.D. 188, 194 (D.N.J. 2014); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696, at *5-6 (N.D. Cal. Feb. 13, 2014); *Adami v. Cardo Windows, Inc.*, 299 F.R.D. 68, 85 (D.N.J. 2014); *see also Stalley v. ADS Alliance Data Sys., Inc.*, 296 F.R.D. 670, 677-80 (M.D. Fla. 2013), *appeal docketed*, No. 14-10872 (11th Cir. Feb. 28, 2014) (“The Court is not convinced by [plaintiffs’] assertion that the proposed class here is sufficiently defined. The Court has not been presented with reasonable methods for ascertaining the identity of [class] individuals.”).

method for ascertaining class members such that Direct Digital would have a fair opportunity to challenge class membership. *Supra* 7-9.

The Seventh Circuit affirmed the certification of the class. It acknowledged that the ascertainability requirement is “well-settled” generally, but held it merely requires that the class “be defined by objective criteria.” Pet. App. 2a. The Seventh Circuit expressly rejected the requirement that plaintiffs must show a “reliable and administratively feasible way” to ascertain those who fall within the sweep of the class definition—a requirement that the court labeled a “heightened” version of ascertainability. *Id.* at 11a. The Seventh Circuit further acknowledged the various courts applying *Carrera* and the policy considerations underlying those decisions, but it held that the requirement of showing a “reliable and administratively feasible way” to ascertain class members was too onerous. *Id.*

A few weeks later, the Sixth Circuit joined the Seventh Circuit in *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015). There, the plaintiff purchased defendant’s probiotic nutritional supplement, and upon finding that it “did not work as advertised,” sued defendant for violations of various state unfair or deceptive practices statutes. *Id.* at 502. The district court certified the proposed classes. *Id.* Defendant appealed on several grounds, including an argument 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*,” particularly in

the wake of the Seventh Circuit's rejection of it in this case. *Id.* at 525 (citing *Mullins*, 795 F.3d 654, 672 (7th Cir. 2015)).

In addition to these two circuit decisions, several district courts have also rejected the Third Circuit's ascertainability standard, choosing instead to require only a class definition based on objective criteria.⁴

⁴ See, e.g., *Daniels v. Hollister Co.*, 440 N.J. Super. 359, 368, 113 A.3d 796, 801 (App. Div. 2015); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 337 n.11 (D. Mass. 2015), *appeal pending*; *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 237-40 (N.D. Cal. 2014); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 564-67 (C.D. Cal. 2014); *McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB (OPx), 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014) ("It appears that pursuant to *Carerra* in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers, *Carerra* prohibits certification of the class. While this may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit."); see also *Rahman v. Mott's LLP*, No. 13-cv-03482-SI, 2014 WL 6815779, at *4 (N.D. Cal. Dec. 3, 2014); (articulating *Carrera*'s standard—"A class is ascertainable if the class is defined with 'objective criteria' and if it is 'administratively feasible to determine whether a particular individual is a member of the class.'"—but applying only the "objective criteria" portion of the test, with no regard for the "administrative feasibility" of identifying class members—"[I]t is enough that the class definition describes a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description.") (citations omitted); *Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK MRWX, 2014 WL 1410264, at *5 (C.D. Cal. Apr. 9, 2014) ("The requirement of an ascertainable class is met as long as the class can be defined through objective criteria." (quoting *Guido v. L'Oreal*,

In sum, the Third Circuit—joined in substantial part by the First, Fourth, and Eleventh Circuits and a host of district courts—properly read Rule 23 to require a class action plaintiff to show at the certification stage not only that a class can be defined through objective criteria, but also that the class members can be feasibly and reliably ascertained. Meanwhile, the Seventh and Sixth Circuits and an equal share of district courts have declined to recognize such a meaningful ascertainability requirement. The high number of cases addressing this important issue, especially in recent years, underscores the need for the Court’s guidance.

II. The Approach Taken By The Seventh And Sixth Circuits Conflicts With This Court’s Recent Precedents On Class Certification And Undermines Fundamental Due Process Interests.

That the question presented here arises so frequently is no surprise. For a consumer retailer facing a proposed class action suit, it is vital to be able to test the bona fides of the class prior to certification. In its recent cases applying Rule 23, this Court has demanded that district courts apply a “rigorous

USA, Inc., Nos. 11-1067, 11-5465, 2013 WL 3353857, at *18 (C.D. Cal. July 1, 2013)) (internal quotation marks omitted)); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) (“[T]he ascertainability difficulties, while formidable, should not be made into a device for defeating the action.”), *reconsideration denied*, No. 13 CIV. 2311(JSR), 2014 WL 1301857 (S.D.N.Y. Mar. 19, 2014).

analysis” at the certification stage to any question that goes to whether “all [a proposed class’s] claims can productively be litigated at once.” *See Wal-Mart*, 131 S. Ct. at 2551; *Comcast*, 133 S. Ct. at 1432. In refusing to consider *before* certification whether a feasible and reliable means to test class membership exists, the Seventh and Sixth Circuits ignore this Court’s directives. Worse still, their rule threatens to eviscerate class action defendants’ due process rights. These shortcomings further merit this Court’s review.

A. This Court is well aware of the dynamics driving class action litigation. As it has explained, 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). That is because, “[w]ith 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); *see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (stating that 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. Other courts have noted the risk of ‘in terrorem’ settlements that class actions entail”). So once the class plaintiff has moved to certify a class, it is often

now-or-never for a defendant wishing to challenge defects in the class action.

This is more than just a matter of litigation strategy. It is a fundamental due process issue. Due process guarantees a defendant “an opportunity to present every available defense,” *Lindsey v. Normet*, 405 U.S. 56, 66 (1972), including, say, a challenge to whether an individual claiming that she purchased the defendant’s product actually did. No one questions that, in an individual proceeding, the defendant would have a full opportunity to do so. That opportunity cannot be compromised in the name of the efficiencies of class adjudication. See *Wal-Mart*, 131 S. Ct. at 2561 (“[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.”). In fact, the Rules Enabling Act bars any application of Rule 23 that would “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). And, of course, Rule 23 itself is “grounded in due process.” *Taylor*, 553 U.S. at 901.

This Court’s recent cases underscore the crucial role Rule 23 plays in safeguarding a defendant’s due process rights. In *Wal-Mart*, the Court emphasized that “Rule 23 does not set forth a mere pleading standard. A party seeking class certification must *affirmatively demonstrate* his compliance with the Rule.” *Wal-Mart*, 131 S. Ct. at 2551 (emphasis added). District courts, for their part, must perform a “rigorous analysis” to guarantee such compliance. *Id.* And, consistent with the notion that the class certification stage may be a defendant’s most meaningful chance to test the viability of the class action, this Court has recognized that “frequently that ‘rigorous

analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Id.*

Comcast Corp. v. Behrend illustrates these principles in action. There, the issue was whether certification of a class of Comcast cable subscribers was appropriate under Rule 23(b)(3), which requires that questions common to the class "predominate over any questions affecting only individual members." 133 S. Ct. at 1430. At the certification stage, Comcast maintained that a class could not be certified because the class plaintiffs' theory of antitrust injury was flawed, and because application of a sound model would require individual damages calculations that would predominate over common issues. *Id.* at 1431, 1436. The Third Circuit, in affirming the district court's certification of a class, declined to consider Comcast's argument. *Id.* In its view, Comcast's "attac[k] on the merits of the [damages] methodology [had] no place in the class certification inquiry." *Id.* (quoting *Behrend v. Comcast Corp.*, 655 F.3d 182, 207 (3d Cir. 2011)).

This Court reversed. It faulted the court of appeals for "refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification." *Id.* at 1432. And, undertaking a review of that methodology, it found that "respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis." *Id.* at 1433. *Comcast* thus stands for the broad proposition that a defendant's due process interest in testing individual claims cannot be sacrificed at the altar of class action convenience. This does not, of course, require the class plaintiff to prove each individual claim on the merits at the cer-

tification stage. But it absolutely requires the plaintiff to show that these individual claims are amenable to class adjudication—that they can be resolved together in a way that is more efficient than individual resolution, but that also honors the defendant’s due process interests.

This Court’s concerns in *Wal-Mart* and *Comcast* are precisely what animate the requirement at issue here. In scores of consumer class actions filed each year in the federal courts, just as in this case, the potential members of the class will almost uniformly lack any proof that they purchased the product at issue. *See supra* 5-7. And the defendant will not have a comprehensive record of particular purchasers either, likely because its products are sold by third-party retailers. If any of these class members sued the defendant individually, no one would question the defendant’s right to challenge whether the individual in fact purchased the product that purportedly caused the harm alleged—whether this requires discovery, depositions, direct testimony, cross-examination, and so forth. *Carrera*, 727 F.3d at 307 (“If this were an individual claim, a plaintiff would have to prove at trial he purchased [the product].”). So in a class action, the plaintiff must make a showing at the certification stage that the defendant will be able to do the same, with the same level or reliability, but also with the administrative feasibility that makes a class action appropriate. *Id.*

To be clear, just as *Comcast* doesn’t require the court to resolve the merits of claims at the certification stage, no one is suggesting that a plaintiff must *actually identify* class members by name at the class certification stage. *See id.* at 308 n.2. The modest as-

certainability requirement at issue here is hardly draconian, and, contrary to the Seventh Circuit's suggestion, will in no way "bar[] low-value consumer class actions," Pet. App. 15a. Rather, a plaintiff need only show that class members *can* be identified in a manner consistent with class adjudication goals and a defendant's due process rights. As the Third Circuit has put it, however, "[a] plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership." *Carrera*, 727 F.3d at 307 (citation omitted). The bottom line is this: Defendants have a right to test individual claims, and if that right cannot be honored while still achieving the efficiency promised by the class action mechanism, a class action is simply not appropriate.

B. The decision below conflicts with this Court's recent class action precedents and undermines class action defendant's due process rights.

1. First, the Seventh Circuit ignored the requirement of a "rigorous" inquiry at the certification stage into the appropriateness of class adjudication. *Wal-Mart*, 131 S. Ct. at 2550-51; *Comcast*, 133 S. Ct. at 1432. It acknowledged that there will be cases in which "it may be challenging to identify particular class members," Pet. App. 18a, and it allowed that there is a "risk of mistaken or fraudulent claims," *id.* at 26a. Yet it thought that "a district court ... normally should ... wait and see how serious the problem may turn out to be after settlement or judgment." *Id.* at 18a-19a. Thus, it deferred any opportunity to challenge even the feasibility and reliability of a method of ascertaining class members

until the claims administration stage and, indeed, after trial. *Id.* at 26a-27a, 36a.

This certify-first-ask-questions-later model is inconsistent with Rule 23 and this Court's precedent. Rule 23(c)(1)(A) demands that a court consider "whether to certify the action"—including, by implication, all the necessary requisites—"[a]t an early practicable time." And *Wal-Mart* and *Comcast* both make absolutely clear that all issues going to the appropriateness of class adjudication must be considered at the certification stage. *Supra* 21-23. By declining to require *any* showing before certification that class members can be ascertained in a reliable and feasible manner, the court's ruling here effectively eliminates the ascertainability requirement, turning it into "a mere pleading standard," *Wal-Mart*, 131 S. Ct. at 2551. This Court has flatly rejected this approach.

2. Second, the court of appeals improperly gave short shrift to a class action defendant's due process interest in being able to ascertain the class membership in a manner that is reliable, feasible, and efficient. It paid lip service to "[a] defendant[s] due process right to challenge the plaintiffs' evidence at any stage of the case." Pet. App. 31a. But it nevertheless thought that "so long as the defendant is given a fair opportunity to challenge the claim to class membership and to contest the amount owed each claimant during the claims administration process, its due process rights have been protected." *Id.* at 35a.

Hardly. As we have explained, once a court certifies a class, a defendant faces the risk of massive lia-

bility. *Supra* 20-21. Given the pressures to settle post-certification and abandon even meritorious defenses, the opportunity to raise challenges to class adjudication early on is key. The notion, advanced by the *Mullins* court, that “if a problem is truly insoluble, the court may decertify the class at a later stage of the litigation” is unrealistic. Pet. App. 19a. By that point, a defendant will often have been forced to settle as a result of the enormous leverage the district court handed the plaintiffs instead of conducting the rigorous analysis this Court has demanded, or will have suffered a verdict that will put the defendant out of business.

It is no answer that a defendant has no “due process right to a *cost-effective* procedure for challenging every individual claim to class membership.” Pet. App. at 31a (emphasis in original). This attempts to address the due process problem—superficially at best, as just explained—but creates another. A class action is appropriate only to the extent it “saves the resources of both the courts and the parties” by allowing an aggregation of similar claims “to be litigated in an economical fashion.” *Falcon*, 457 U.S. at 155 (citation omitted). As the Third Circuit explained, “[i]f class members are impossible to identify without extensive and individualized fact-finding or mini-trials, then a class action is inappropriate.” *Carrera*, 727 F.3d at 305 (citation and internal quotation marks omitted). So even if it were true that a defendant’s *due process interests* were satisfied by thousands of mini-trials during claims administration, it does not follow that *Rule 23* is satisfied. And indeed it should not be, lest consumer class actions turn into little more than a vehicle for attorney-fee driven settlements.

Nor is the Seventh Circuit's ruling justified by its policy concern that requiring a feasible and reliable means of ascertaining class members "effectively bars low-value consumer class actions." Pet. App. 15a. To begin with, notwithstanding the familiar doomsday rhetoric, the Seventh Circuit itself allows that consumer class actions are alive and well "where plaintiffs ... have documentary proof of purchases." *Id.* And, more fundamentally, a judicial policy preference in favor of class action litigation is neither a basis for excusing smaller-dollar claims from the requirements of Rule 23, nor a valid ground for trampling defendants' due process rights. *Cf. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) (rejecting notion that Rule 23 should be relaxed on account of "prohibitively high cost of compliance") (citation and internal quotation marks omitted).

Because the Seventh Circuit's decision conflicts with this Court's precedent and ignores important due process interests, this Court should intercede.

III. This Case Is An Ideal Vehicle For Resolving The Question Presented.

Finally, this Court should grant the petition because this case is a perfect vehicle for resolving the question. The Seventh Circuit concluded simply and squarely that Rule 23's ascertainability standard does not require a defendant to make *any* showing of a reliable and administratively feasible mechanism for identifying class members "at an early practicable time," Fed. R. Civ. P. 23(c)(1)(A). Pet. App. 26a.

Neither the Seventh Circuit nor the district court rested its decision on alternative grounds or on fact-bound issues peculiar to the record in this case. And the Seventh Circuit flatly acknowledged that its ruling split from the Third and Eleventh Circuits and the many district courts that have followed that approach, without attempting to distinguish those cases. *Id.* at 3a-4a, 11a-15a & n.2. The result in this case therefore turns on this split. The clean ruling and posture make this case an ideal one for review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

Daniel S. Silverman
Ari N. Rothman
Benjamin E.
Horowitz
VENABLE LLP
575 7th Street N.W.
Washington, D.C. 20004
(202) 344-4220

/s/ E. Joshua Rosenkranz
E. Joshua Rosenkranz
Counsel of Record
Robert Loeb
Christopher J. Cariello
Haley E. Jankowski
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, New York
10019
(212) 506-5000
jrosenkranz@orrick.com

October 26, 2015