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 U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Federal Rule of Civil Procedure 23 permits a district court to certify a damages class where there is no reliable, administratively feasible method for identifying the members of the class.

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INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared before this Court as well as other federal courts to oppose the certification of inappropriate and unwieldy class actions under Federal Rule of Civil Procedure 23. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011). In particular, WLF has opposed certification in cases in which there was no reliable, administratively feasible method for identifying the members of the class. *See, e.g., Jones v. Conagra Foods, Inc.*, No. 14-16327 (9th Cir., dec. pending).

On several occasions, WLF has filed formal comments with the Advisory Committee on Civil Rules regarding proposed amendments to Rule 23. *See, e.g.*, Comments filed February 15, 2017 (urging Committee to eliminate from the Note to Rule 23(e)(1) an implicit endorsement of the use of *cy pres* when settling class actions, and to consider adopting an explicit

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file. All parties have consented to the filing; blanket letters of consent have been lodged with the Court.

ascertainability requirement). In addition, WLF's Legal Studies Division, the publishing arm of WLF, has published numerous studies and analyses on issues related to class-action litigation. *See, e.g.*, James M. Beck and Rachel B. Weil, "Cy Pres" *Awards: Is the End Near for a Legal Remedy with No Basis in Law?*, WLF Working Paper No. 188 (Oct. 2014) ["Beck and Weil"]; David E. Sellinger and Aaron Van Nostrand, *With Ninth Circuit Exacerbating Legal Discord on "Ascertainability," Time for SCOTUS to Resolve Split*, WLF Legal Pulse (Jan. 26, 2017).

WLF believes that an unascertainable class is no class at all. In the absence of the fundamental threshold requirement that there exist a reliable, administratively feasible method for identifying the members of a class, WLF fears that the class action will be transformed from a device designed to avoid the inefficiencies of trying (and deciding) the same claims repeatedly into a device that alters substantive rights by excusing class-action plaintiffs from satisfying even the most basic prerequisite for class-wide relief: class membership.

STATEMENT OF THE CASE

The facts of the case are set out in detail in the Petition. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Respondent Robert Briseño is a consumer who purchased Wesson-brand cooking oil products labeled "100% Natural." He argues that the "100% Natural" label is false or misleading because Wesson oils contain

genetically modified organisms (GMOs) that he contends are not "natural." He and similarly situated plaintiffs filed putative class actions asserting state-law claims in 11 States against Petitioner Conagra Brands, Inc. (the maker of Wesson products) and seeking damages. The federal district judge before whom the cases were consolidated ultimately granted a motion to certify 11 statewide classes under Rule 23(b)(3). Pet. App. 40a-254a.

The Ninth Circuit affirmed. Pet. App. 1a-39a. It held that "the district court did not err in declining to condition class certification on Plaintiffs' proffer of an administratively feasible way to identify putative class members." *Id.* at 25a.

In declining to condition class certification on such a showing, the Ninth Circuit acknowledged that its decision directly conflicted with Third Circuit case law, which imposes an "administrative feasibility" requirement on all class-certification decisions. *Id.* at 11a-12a. The Ninth Circuit rejected both the Third Circuit's interpretation of Rule 23 and its conclusion that an administrative-feasibility requirement is "a necessary tool to ensure that the class will actually function as a class." *Id.* at 12a.[2]

The appeals court held that "courts should not refuse to certify a class merely on the basis of

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[2] The administrative-feasibility requirement is often referred to alternatively as "ascertainability." The Ninth Circuit refrained from referring to "ascertainability" in its opinion, explaining that "courts ascribe widely varied meanings to that term." *Id.* at 5a n.3.

manageability concerns," but rather should address manageability issues only in connection with a Rule 23(b)(3) "superiority" determination; *i.e.*, whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* at 14a.

The Ninth Circuit acknowledged that in the absence of any documents listing the names of Wesson oil purchasers, it will be very difficult to provide notice to members of the class. It concluded, however, that absence of notice should not preclude certification, stating that "courts have long employed *cy pres* remedies when some or even all potential claimants cannot be identified." Pet. App. 16a. The court added, "the notion that an inability to identify all class members precludes class certification cannot be reconciled with our court's longstanding *cy pres* jurisprudence." *Ibid.*

While recognizing that class members who do not become aware of the lawsuit will be in no position to claim a share of any recovery, the appeals court deemed its approach superior to imposition of an "administrative feasibility" requirement that would likely preclude class certification in many low-cost consumer class actions:

> [A]n administrative feasibility requirement like that imposed by the Third Circuit would likely bar such actions because consumers generally do not keep receipts or other records of low-cost purchases. Practically speaking, a separate administrative feasibility

> requirement would protect a purely theoretical interest of absent class members at the expense of any possible recovery for all class members.

Id. at 17a. In other words, because the interests of absent class members are not worth all that much to begin with (*i.e.*, their interest in a recovery are "purely theoretical"), it is acceptable (the appeals court concluded) to sacrifice their interests so that at least *some* consumers can have a possibility of recovery.

The Ninth Circuit also rejected the Third Circuit's conclusion that an administrative feasibility requirement is "necessary to protect the due process rights of defendants to raise individual challenges and defenses to claims." Pet. App. 19a. The court noted that Conagra had an opportunity at the certification stage to contest the claims of the named plaintiffs that they purchased Wesson oil during the class period, and that it would have "similar opportunities to individually challenge the claims of absent class members if and when they file claims for damages." *Id.* at 21a.

Moreover, the court concluded, any due process concerns would be obviated if the plaintiffs prevail on their proposed theory of liability. *Id.* at 23a-24a. Plaintiffs assert that damages ought to be calculated based on "the price premium attributable to the allegedly false statement that appeared on every unit sold during the class period." *Id.* at 23a. If that theory prevails, then (the court concluded) Conagra's aggregate liability to the class can be calculated by multiplying the price premium by the number of units

sold. *Id.* at 23a-24a. Under those circumstances, whether the identity of class members can be ascertained "does not implicate the defendant's due process rights at all because the addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class." *Id.* at 24a (internal quotation omitted).

SUMMARY OF ARGUMENT

The petition raises an issue of exceptional importance. As the Court has frequently reminded, the class action is "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, 700-01 (1979). Yet the decision below threatens to make class certification the general rule rather than the exception in the rapidly growing number of lawsuits alleging that food products bear misleading labels. If this case—in which the Ninth Circuit ordered certification despite uncontested evidence that there are no records that can be used to identify and contact class members—is a proper candidate for class certification, then it is difficult to imagine any consumer-product labeling case in which the Ninth Circuit would deny certification.

The petition cogently explains that the federal appeals courts are sharply and irreconcilably split regarding whether Rule 23 requires a plaintiff seeking class certification to demonstrate that there exists a reliable, administratively feasible method for identifying the members of the class. Review is warranted to resolve that conflict.

The evidence of a sharp circuit split, which the Ninth Circuit openly acknowledges, need not be repeated here. Rather, WLF writes separately to focus on why the decision below is inconsistent with the language of Rule 23 and the Rules Enabling Act, violates the due process rights of both absent class members and defendants, and will produce unwieldy certified classes that could not realistically be brought to trial.

Numerous provisions of Rule 23 support the Third Circuit's conclusion that class certification under Rule 23(b)(3) is inappropriate unless the plaintiffs can demonstrate a reliable, administratively feasible method for identifying the members of the class. "Predominance," "superiority," "typicality," and the ability of named representatives to "fairly and adequately represent the interests of the class" are among the many Rule 23 requirements that the plaintiffs cannot satisfy if they cannot demonstrate the requisite administrative feasibility.

Review is also warranted in light of the Ninth Circuit's disregard of the due-process rights of absent class members. In a class action involving claims for money damages, the Due Process Clause requires at a minimum that absent plaintiffs receive notice of the action and an opportunity to participate in the litigation. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The Ninth Circuit effectively conceded that virtually no absent class members will receive notice of this suit because their names cannot be ascertained, and thus they cannot be contacted. Pet. App. 15a-17a. It concluded, however, that absence of direct notice did not present due-process concerns. *Id.*

at 16a (asserting that "[c]ourts have routinely held that notice by publication in a periodical, on a website, or even an appropriate physical location is sufficient to satisfy due process."). But no decision of this Court has ever approved a notice procedure where, as here, it is virtually certain that the vast majority of class members will never see the notice and thus will have no opportunity either to opt out or to submit a claim.

The Ninth Circuit concluded that the inability to notify absent class members was not a problem because the "court's longstanding *cy pres* jurisprudence" permits the unclaimed portion of any damages award to be donated to appropriate charitable organizations. *Ibid*. That conclusion provides an additional reason to grant review. This Court has never endorsed application of the *cy pres* doctrine in the class-action context. It certainly has never suggested that *cy pres* justifies certification of a class when, in all likelihood, most of the class members will receive no monetary benefit from any judgment yet ostensibly will be bound by it.

Review is also warranted because the decision below conflicts with this Court's decisions regarding the due-process rights of class-action defendants. Conagra is being required to defend these labeling claims on a class-wide basis, yet it has been placed in a no-win situation. If the plaintiffs prevail, Conagra will face substantial monetary liability. But if Conagra prevails, its victory will be extremely limited: it will have defeated the false-labeling claims of only a handful of named plaintiffs. For the reasons described above, absent plaintiffs most likely would not be bound by any judgment in favor of Conagra and thus would

remain free to file an identical lawsuit of their own. Due process requires that if Conagra must face the possibility of a class-wide loss, it should also be afforded the possibility of a class-wide victory.

The Court should also grant review because the decision below violates the Rules Enabling Act by interpreting Rule 23 in a manner that expands the substantive rights of class plaintiffs. The Ninth Circuit and other federal appeals courts that reject the Third Circuit's approach have asserted that an administrative-feasibility requirement is inappropriate because, they fear, it would undercut what they view as a major "policy objective" of Rule 23: "punishing and deterring corporate wrongdoing." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 668 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016). But this Court has never endorsed use of Rule 23 to further substantive "policy objectives"; it is simply a procedure designed to increase litigation efficiency. Indeed, the Court has stressed that "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive rights.'" *Wal-Mart*, 564 U.S. at 367 (citing 28 U.S.C. § 2072(b)). Rule 23 violates that prohibition when it is interpreted as justifying class certification for the purpose of punishing and deterring alleged "wrongdoing" that might otherwise go unpunished.

Finally, review is warranted because the decision below will frequently produce certified class actions that serve the interests of no one other than plaintiffs' counsel and a handful of named plaintiffs. Such certifications inevitably result in settlements from which only a minuscule percentage of absent class members receive a monetary benefit. But those

settlements generate handsome attorney-fee awards (and incentive payments to named plaintiffs), ostensibly justified by the substantial benefit supposedly provided to the plaintiff class (in the form of *cy pres* awards). Respondent Briseño asserts that the Ninth Circuit's approach is appropriate because imposing an administrative-feasibility requirement might substantially reduce the availability of judicial redress for low-value consumer complaints. That assertion not only shortchanges other often-available mechanisms for obtaining relief (*e.g.*, attorney general suits) but also overlooks the fact that class actions of the sort at issue here are incapable of providing meaningful relief to the vast majority of consumers.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted in light of the sharp and acknowledged conflict between the decision below and the Third Circuit's decision in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). Pet. App. 12a.[3] This case is an excellent vehicle for resolving that conflict. Pet. 23-28. Review is particularly warranted because the decision below is wrong and conflicts with numerous decisions of this Court. WLF writes separately to focus on the deficiencies in the Ninth Circuit's analysis.

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[3] As Conagra notes, the decision below also conflicts with decisions from the Second, Fourth, and Eleventh Circuits, while the Sixth and Seventh Circuits agree with the Ninth Circuit that class certification is permissible even in the absence of a reliable, administratively feasible method for identifying members of the class. Pet. 10-19.

I. THE ASCERTAINABILITY REQUIREMENT FLOWS DIRECTLY FROM NUMEROUS EXPLICIT PROVISIONS OF RULE 23

In rejecting an ascertainability requirement for class certification, the Ninth Circuit focused on the absence of the phrase "administrative feasibility" or a synonym in the language of Rule 23. Pet. App. 12a. According to the Ninth Circuit, the Third Circuit did not seek to "justif[y]" its administrative-feasibility requirement based "on the text of Rule 23" but rather on the need to ensure that "the class will actually function as a class." *Ibid*.

That assessment was a misreading of Third Circuit case law, which seeks to ground the administrative-feasibility requirement in specific provisions of Rule 23. *See, e.g., Marcus v. BMW of N. America*, 687 F.3d 583, 593 (3d Cir. 2012) (tying ascertainability to Rule 23(b)(3)'s requirement that common issues of law or fact "predominate" over individual issues of law or fact).

Indeed, the Ninth Circuit's rejection of an administrative-feasibility requirement cannot be squared with the text of Rule 23. For example, a class that cannot meet that requirement will not be able to satisfy Rule 23(b)(3)'s predominance requirement. The Ninth Circuit does not contest that there are no records that verify the identity of Wesson oil purchasers—and thus that there will be no means of ascertaining the identity of absent class members for the purpose of notifying them of the lawsuit. Their identity will remain a mystery until individuals come forward and submit affidavits in support of a claim against a

settlement fund. At that point, the Ninth Circuit concedes, Conagra is entitled "to *individually* challenge the claims of absent class members if and when they file claims for damages." Pet. App. 21. Yet if not only the amount of damages but even the identity of class members and Conagra's liability to them must be resolved on an individual-by-individual basis, the only plausible conclusion is that individual issues predominate over common issues. As the Third Circuit explained:

> A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership. "Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individualized factual inquiry."

Carrera, 727 F.3d at 307-08 (quoting William B. Rubenstein & Alba Conte, *Newberg on Class Actions* § 3:3 (5th ed. 2011)).[4]

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[4] As Conagra notes, there is serious reason to doubt individuals' ability to remember accurately, in the absence of written records, the quantity and the brand names of cooking oils they purchased years earlier, let alone the purchase dates. Pet. 34. But even if one puts aside those reliability issues, both liability and damages issues will very likely need to be resolved on an individual-by-individual basis in the total absence of purchase records.

Rule 23(a)(3) requires the named plaintiffs to demonstrate that their claims "are typical of the claims or defenses of the class." The Court requires district courts to "rigorous[ly] analy[ze]" the named plaintiffs' compliance with the typicality requirement before certifying a class under Rule 23. *Comcast Corp. v. Behrend*, 133 S. Ct. at 1432. Yet it is impossible for the named plaintiffs to make the requisite typicality showing when they not only do not know who the class members are but cannot even explain how to go about ascertaining class members' identities. Similarly, they cannot demonstrate that "they will fairly and adequately protect the interests of the class," FRCP 23(a)(4), in the absence of an administratively feasible method for identifying the members of the class.

Indeed, there is considerable reason to doubt that Briseño will "fairly and adequately protect the interests of the class" if he cannot identify class members and thus has no means of notifying them (other than by an unlikely-to-be-seen publication) of their right to file a claim if the class recovers damages. Briseño and class counsel will be likely to profit handsomely from any such recovery; non-notified, absent class members will not.

The Ninth Circuit acknowledged that the named plaintiffs' inability to demonstrate administrative feasibility is relevant to Rule 23's "superiority" requirement.[5] But the court concluded that even when

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[5] In order to obtain certification under Rule 23(b)(3), the named plaintiff must demonstrate (among other things) that "a class action is superior to other methods for fairly and efficiently adjudicating the controversy." Among the factors to be considered

there is no reliable, administratively feasible method for identifying class members, a class action *always* satisfies the superiority requirement when "the realistic alternative to class litigation will be no litigation at all." Pet. App. 39a. That formulation misreads Rule 23(b)(3) because it ignores the availability of other methods of "fairly and efficiently resolving the controversy," such as enforcement actions by the federal Food and Drug Administration or state attorneys general. Nor does it recognize the extreme "difficulties in managing a class action" whenever (as here) both liability and damages will need to be adjudicated on an individual-by-individual basis.

Because the Ninth Circuit's rejection of an administrative-feasibility requirement is inconsistent with the text of Rule 23, review by this Court is warranted.

II. CERTIFYING A CLASS WHERE, AS HERE, THE IDENTITY OF CLASS MEMBERS CANNOT FEASIBLY BE IDENTIFIED VIOLATES THE DUE-PROCESS RIGHTS OF ABSENT CLASS MEMBERS AND DEFENDANTS

Review is also warranted because the Ninth Circuit decision endorses class certification in a manner that violates the due-process rights of both absent class members and defendants.

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in determining "superiority" are "the likely difficulties in managing a class action." FRCP 23(b)(3)(D).

A. The Rights of Absent Class Members

This Court has repeatedly recognized that the Due Process Clause provides individuals with significant rights to resist the jurisdiction of a court that seeks to adjudicate their damage claims by means of a class action. Most importantly, absent plaintiffs are entitled to: (1) adequate notice of the class action; (2) an opportunity to be heard and participate in the litigation; (3) an opportunity to opt out and pursue their claims separately; and (4) adequate representation at all times by the named plaintiffs. *Shutts*, 472 U.S. at 812. Yet when, as here, it is impossible to ascertain the identity of class members, it is not possible to provide them with the requisite due-process notice and the requisite opportunity to participate in the litigation (by, for example, submitting a claim for a share of any judgment). Under these circumstances, the due process clause prohibits a court from binding absent class members to its judgment.

In its discussion of due process rights, the Ninth Circuit failed to cite *Shutts*. It focused primarily on the third of the four due-process rights: the opportunity to opt out and pursue claims separately. The court conceded that, "[i]n theory," inadequate notice might create a risk that absent class members would be denied the opportunity to opt out. Pet. App. 17a. The court discounted that due-process concern, however, reasoning that "in reality that risk is virtually nonexistent in the very cases in which satisfying an administrative feasibility requirement would prove most difficult—low-value consumer class actions." *Ibid*. Because the court concluded that absent class

members would almost never seek to opt out of such class actions, it ruled that their "purely theoretical interest" in an opt-out right should not stand as an obstacle to class certification. *Ibid.*[6]

However, the Ninth Circuit failed to address other due-process rights enumerated by *Shutts*, including the right to participate in the litigation by, for example, submitting a claim for payment. Because, as the Ninth Circuit effectively conceded, no absent class members will be directly notified of the suit against Conagra, virtually none of them will learn of it. If absent class members never learn about the lawsuit, they will have no opportunity to file a claim—a due-process right that a significant number would choose to exercise if provided the opportunity.

The Ninth Circuit recognized that "actual notice" to absent class members was not possible in the absence of an administratively feasible method for identifying members of the class. But it dismissed as "unfounded" concerns that the inability to directly

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[6] The Ninth Circuit betrays a bias here. It assumes potential class members would not opt out because the cost of pursuing a separate claim is prohibitive. But that is *not* the only reason class members might opt out. WLF supporters, for example, choose to opt out of class actions routinely because they recognize that the likeliest outcome will be a meager recovery for them coupled with huge costs for the company and a huge payout to plaintiffs' attorneys. These large transaction costs will just cause future price increases for a product they wish to purchase. In other words, there are perfectly rational reasons to opt out of a class action entirely—reasons that due process must respect and protect—that the Ninth Circuit's assumption ignores and that the Ninth Circuit's supposed *cy pres* remedy actually offends.

notify absent class members violated due process rights. Pet. App. 15a. The court stated that "the Due Process Clause does not require actual, individual notice in all cases" and held that alternate notification methods—"such as notice through third parties, paid advertising, and/or posting in places frequented by class members"—would likely be constitutionally adequate. *Id*. at 16a.

That holding conflicts with this Court's case law. Notice of court proceedings is constitutionally adequate only if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). When lists of purchasers of consumer products do not exist, there is *no* notification method "reasonably calculated" to apprise any sizable percentage of those purchasers that they are members of a plaintiff class—and the Ninth Circuit did not suggest otherwise. When there is no means of providing constitutionally adequate notice, *Shutts* bars certification of a class. 472 U.S. at 812. As the Court recognized in a case in which it affirmed denial of class certification, when the proposed class consists of "legions so unselfconscious and amorphous," grave doubts exist regarding "whether class action notice sufficient under the Constitution and Rule 23 could ever be given." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997).

The Ninth Circuit also concluded that the inability to notify absent class members was not a problem because the "court's longstanding *cy pres*

jurisprudence" permits the unclaimed portion of any damages award to be donated to appropriate charitable organizations. Pet. App. 16a. The court's apparent theory: absent class members somehow benefit from those donations and thus have no cause to complain that they received no direct compensation. But this Court has never endorsed application of the *cy pres* doctrine in the class-action context. Indeed, one member of the Court has stated that use of such remedies in class-action litigation raises "fundamental concerns," including questions regarding "its fairness as a general matter." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (mem.) (statement of Roberts, C.J., respecting the denial of certiorari).[7] He stated that "[i]n a suitable case, this Court may need to clarify the limits on the use of [*cy pres*] remedies." *Ibid.* The propriety of *cy pres* awards is directly at issue in this petition; the Ninth Circuit explicitly relies on the availability of such awards as reason to reject an administrative-feasibility requirement.

B. The Rights of Defendants

Review is also warranted because the decision below conflicts with this Court's decisions regarding the due-process rights of class-action defendants. By approving the certification of classes whose members

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[7] Another "fundamental concern" regarding use of *cy pres* remedies in the class-action context is that it creates the potential for conflicts of interest between class counsel and absent class members. Class counsel generally will have a strong financial incentive (based on potential fee awards) to propose settlement awards with large *cy pres* components as an alternative to awards earmarked for class members. *See* Beck and Weil, *supra*, at 7-9.

cannot be ascertained, the Ninth Circuit places defendants in an untenable situation. They are faced with lawsuits that they may lose but that they can never win.

Shutts explained that a class-action defendant has a due-process right not to face a potential class-wide judgment unless it can be assured that the entire class will be bound by a judgment in the defendant's favor:

> Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court had jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

Shutts, 472 U.S. at 805.

As we explain above, absent class members will have a strong argument that they are not bound by any judgment in Conagra's favor. Because there is no administratively feasible method for identifying members of the class, the vast majority of absent class members will not receive notice of the lawsuit—and under established due-process case law, absent class members who have not received notice and an opportunity to submit a claim will not be bound by any

judgment.

As *Shutts* explains, the Due Process Clause does not permit defendants to be confronted by no-win litigation of that sort. Due process requires that if Conagra must face the possibility of a class-wide loss, it should also be assured the possibility of a class-wide victory. Because there can be no such assurance when the class aligned against Conagra is unascertainable, certification of such classes violates Conagra's due process rights.

III. THE DECISION BELOW INTERPRETS RULE 23 IN A MANNER THAT VIOLATES THE RULES ENABLING ACT

The Court should also grant review because the decision below violates the Rules Enabling Act by interpreting Rule 23 in a manner that expands the substantive rights of class plaintiffs.

"[T]he Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights.'" *Wal-Mart*, 564 U.S. at 367 (citing 28 U.S.C. § 2072(b)). Indeed, Rule 23 was designed solely for the purpose of improving litigation efficiency, by enabling litigants to avoid the time and expense of trying (and deciding) the same claims repeatedly. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982) (stating that "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.").

The Ninth Circuit has certified a class in a case with far more ambitious goals than merely improving litigation efficiency. Briseño's damages model seeks recovery for *every* unit of Wesson oil sold by Conagra, with full knowledge that the parties will never locate (and thus will never compensate) the vast majority of purchasers. Indeed, settlement claims rates in class actions of this sort rarely exceed a small fraction of 1% of total sales. Thus, Conagra's potential liability to the class is thousands of times greater than it would have been had no class been certified and *every single one* of the likely claimants had filed a separate lawsuit. Under these circumstances, the class certification in this case has enlarged the plaintiffs' substantive rights, in apparent violation of the Rules Enabling Act.

Moreover, the Ninth Circuit's rationale for rejecting an administrative-feasibility requirement is inconsistent with the Rules Enabling Act. The Ninth Circuit and other federal appeals courts that reject the Third Circuit's approach have asserted that an administrative-feasibility requirement is inappropriate because, they fear, it would undercut what they view as a major "policy objective" of Rule 23: "punishing and deterring corporate wrongdoing." *Mullins*, 795 F.3d at 668 (7th Cir. 2015). That is, stricter class-certification requirements will reduce the number of certified class actions, which will in turn reduce punishment and deterrence of wrongdoing. Because that rationale seeks to employ Rule 23 to modify substantive rights, it runs afoul of the Rules Enabling Act.

IV. CERTIFYING UNASCERTAINABLE CLASSES BENEFITS NO ONE OTHER THAN PLAINTIFFS' COUNSEL

To a large extent, the Ninth Circuit premised its rejection of an administrative-feasibility requirement on its *policy* judgment that a certified class—no matter how unmanageable—is always preferable to pricing individuals out of court. In conclusively rejecting Conagra's objections that the certified class was unmanageable, the court stated, "[T]he benefits of the class mechanism are best realized in cases like this, where the likely recovery is too small to incentivize individual lawsuits and the realistic alternative to class litigation will be no adjudication at all." Pet. App. 38a-39a. Review is warranted for the additional reason that the Ninth Circuit's policy judgment is likely to lead to a large increase in class certifications in low-value consumer cases.

WLF submits that the Ninth Circuit's policy judgment is misguided. The evidence suggests that class certification in cases of this sort provides little, if any, benefit for the typical consumer and generally serves the interests of no one other than plaintiffs' counsel and a handful of named plaintiffs.

Consumers can benefit from Rule 23(b)(3) class actions seeking damages only if they obtain a share of any settlement fund.[8] All evidence indicates that the

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[8] Low-value consumer class actions virtually never go to trial. As both the Court and numerous commentators have observed, once the class is certified, businesses face overwhelming economic pressure to settle even insubstantial claims. *See, e.g.,*

vast majority of absent class members go uncompensated because they never learn about settlement funds and thus never submit claims. *See, e.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014) (citing authorities); *In re Carrier IQ, Inc., Consumer Privacy Litig.*, No. 12-md-02330, 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016) (citing analysis by well-respected claims administrator that found a medium claims rate of .023% in publication notice cases); Joanna Shepherd, *An Empirical Study of No-Injury Class Actions*, Emory Legal Studies Research Paper No. 16-402 (Feb. 1, 2016); Alison Frankel, *A Smoking Gun in Debate over Consumer Class Actions?*, REUTERS (May 9, 2014) (reporting that median claims rate in consumer cases with publication notice is "1 claim per 4,350 class members"); Daniel Fisher, *Odds of a Payoff in Consumer Class Action? Less Than a Straight Flush*, FORBES (May 8, 2014).

In sharp contrast, class counsel generally profit handsomely from settlement of low-value consumer class actions that have been certified by the district court. Courts routinely award fees to class counsel based on the total value of the settlement to class members. Because most federal courts include *cy pres* awards when determining value, the settlement dollars paid to class counsel routinely dwarf the dollars paid directly to class members. *See, e.g., Gascho v. Global Fitness Holdings, LLC*, 822 F3d 269 (6th Cir. 2016), *cert. denied sub nom., Blackman v. Gascho*, 137 S. Ct. 1065 (2017).

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011).

The Ninth Circuit's policy judgment—that an unmanageable class action should nonetheless be certified if the alternative is no litigation because consumers cannot afford to litigate individually—makes little sense when (as is virtually always true) a low-value consumer class action provides *no* benefit to the vast majority of absent class members.

That policy judgment also short-changes other often-available mechanisms that can provide meaningful relief to consumers while avoiding an unmanageable class action. Those mechanisms include enforcement actions filed by FDA or state attorneys general. They also include class actions seeking injunctive relief under Rule 23(b)(2).

Finally, as the petition demonstrates, requiring plaintiffs seeking Rule 23(b)(3) certification to demonstrate a reliable, administratively feasible method for identifying the members of the class will not preclude certification of all low-value consumer class actions. For example, written records identifying class members may well exist if a product is frequently purchased on-line or pursuant to a written purchase agreement. But when, as here, no purchase records exist because consumers generally purchase the product in grocery stores, certification of a class makes little sense because the administrative-feasibility requirement cannot be met and very few consumers are likely to benefit from the class action. Review of the Question Presented is warranted, both because the federal appeals courts are sharply split on the issue and because the Ninth Circuit's resolution of the issue

is inconsistent with Rule 23, due-process principles, and common sense.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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