No. 15-549

IN THE

Supreme Court of the United States

DIRECT DIGITAL, LLC,
Petitioner,
v.
VINCE MULLINS,
Respondent.

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

BRIEF OF AMICUS CURIAE DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

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DRI is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as amicus curiae in cases that raise issues important to its membership and their clients, including cases that address fairness and consistency in class action procedures. In DRI's view, these interests are best served by requiring objective, reliable, and administratively feasible methods of ascertaining the members of a class before certification under Rule 23. DRI submits this brief urging the Court to reject the Seventh Circuit's contrary view.

DRI's perspective would assist this Court in evaluating the important and frequently recurring question of class action procedure presented in the

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[1] Counsel for all parties received notice at least 10 days before the due date of the amicus's intention to file this brief, and all parties have consented to the filing. No counsel for a party authored this brief in whole or in part, no counsel for a party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the amicus and its counsel made any such monetary contribution.

petition for certiorari. The brief is timely submitted on proper notice to all parties and with the parties' consent.

SUMMARY OF THE ARGUMENT

Despite this Court's repeated admonition to conduct a "rigorous analysis" of Rule 23's requirements prior to class certification—*see Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432–35 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–52 (2011)—the decision below defers ascertainability to a later stage, and essentially eliminates any inquiry into the administrative feasibility of identifying actual class members.

Sensibly, a "class" under Rule 23 is only a class if it is made up of a readily ascertainable collection of real people. Otherwise, the case will devolve into individual litigation over who is bound by the class proceedings, a concept directly at odds with the efficiency objectives of class adjudication. Therefore, the Court should take this opportunity to make it clear that a suit cannot be certified as a class action until the representative plaintiffs demonstrate that the class is readily ascertainable in fact.

In this case, the Seventh Circuit acknowledged the need for ascertainability in theory. The court, however, made ascertainability in practice a weak requirement by watering down the relevant test. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659–61 (7th Cir. 2015). It endorsed a formulation of ascertainability that does not require reliable and administratively feasible methods for identifying

whether criteria for class eligibility are met in a particular case. *Id*. The court affirmed certification of a class of all consumers who purchased a product known as "Instaflex" within a certain time period, but it did so without satisfying itself that this universe of people can be feasibly identified without individualized proceedings. *Id*. at 658–59, 674.

A plurality of the circuits has rejected this weak ascertainability test. These circuits have wisely adopted a strong ascertainability test, which requires plaintiffs to show that a putative class can be reliably and feasibly ascertained prior to certification. This approach is truer to Rule 23's text and purpose and better protects litigants' substantive rights.

By ensuring that defendants litigate against a collection of real people, rather than against a phantom, the strong test avoids expensive and time-consuming collateral disputes over class eligibility—the very kinds of delay and expense that Rule 23 is designed to avoid. The strong test also acts as an effective check against familiar abuses of the class action procedure: fail-safe classes and classes that have such a low rate of distributing proceeds that the proceeds will inevitably have to be paid to third parties as *cy pres* relief.

Rule 23's requirements are not silos. They are integrated parts designed to determine when it is consistent with due process to depart from the default rule that every litigant's claim must be resolved individually. A class action is a means to an end, not an end unto itself. Administrative difficulty in ascertaining a class should mean that the class is

not certified; it should not mean that administrative feasibility is discarded as an inconvenient requirement. The Court should grant certiorari, resolve the circuit split, and prevent the abuse of the class action procedure that a weak ascertainability test will cause.

ARGUMENT

I. THE COURT'S RESOLUTION OF THE QUESTION PRESENTED IS NECESSARY FOR A UNIFORM INTERPRETATION OF RULE 23.

The Seventh Circuit's decision acknowledges ascertainability as a Rule 23 requirement. Unfortunately, it rejects the prevailing, meaningful ascertainability standard and embraces an admittedly "weak" one. *Mullins*, 795 F.3d at 659. Specifically, it rejects the need to find a "reliable and administratively feasible" method for identifying class members before certifying a class. *Id.* at 661–63. In the Seventh Circuit's view, ascertainability only mandates that a class be defined "with objective criteria." *Id.* at 672.

The Circuits are deeply and irreconcilably split on this question. On the one hand, the Second, Third, Fourth, and Eleventh Circuits apply a strong ascertainability standard that insists on administratively feasible methods for identifying class members prior to class certification. *See Brecher v. Republic of Argentina*, 802 F.3d 303, 304–06 (2d Cir. 2015); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307–08 (3d Cir. 2013); *EQT Prod. Co. v. Adair*,

764 F.3d 347, 358–60 (4th Cir. 2014); *Karhu v. Vital Pharm., Inc.*, No. 14-11648, 2015 WL 3560722, at *2–4 (11th Cir. June 9, 2015).

The Sixth and Seventh Circuits, on the other hand, apply a weak standard. *See Rikos v. P&G*, 799 F.3d 497, 524–26 (6th Cir. 2015); *Mullins*, 795 F.3d at 659. The Court should resolve this circuit split, not only to correct the Sixth and Seventh Circuits' error, but also to ensure that defendants in federal courts do not receive unequal application of the same Rule 23 by virtue of plaintiffs' forum selection.

Uniformity in important questions of federal law is a basic expectation of civil litigants and a foundational value for the federal courts. *See* SUP. CT. R. 10(a); *see also* Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 605, 615–16 (1989); Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts By Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 608 (2003). Stark regional differences in the interpretation of federal laws undermine both the purpose of the federal courts and their legitimacy in the public's perception. Meador, *supra*, at 615–16; *see also* Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1170–74 (2012).

If the circuit split persists, courts applying the weak ascertainability test will become magnets for class action litigation. Defendants litigating in those courts will have fewer procedural safeguards than elsewhere. In all class actions, justice will be

administered unequally because of where class representatives choose to locate their suits.

This situation is incompatible with what the Rules Enabling Act guarantees: "a uniform and consistent system of rules governing federal practice and procedure." *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987). The Court should grant certiorari to resolve the circuit split.

II. THE WEAK ASCERTAINABILITY TEST CONTRADICTS RULE 23'S TEXT AND PURPOSE.

The frequently recurring question in Direct Digital's petition addresses the proper *procedure* for ascertaining the members of a class. There can be no valid dispute that ascertainability is an inherent Rule 23 requirement for certifying a class. Every federal court of appeals to have considered that issue, including the Seventh Circuit, has recognized an ascertainability requirement. *See Crosby v. Soc. Sec. Admin.*, 796 F.2d 576, 580 (1st Cir. 1986); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 30, 44–45 (2d Cir. 2006); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–94 (3d Cir. 2012); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970); *Romberio v. Unumprovident Corp.*, 385 F. App'x 423, 431 (6th Cir. 2009); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513–14 (7th Cir. 2006); *Ihrke v. N. States Power Co.*, 459 F.2d 566, 573 n.3 (8th Cir. 1972), *vacated on other grounds*, 409 U.S. 815; *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012).

The two circuits that have adopted the weak standard have not rejected the ascertainability requirement altogether. Instead, they gutted the requirement of its meaning and, in doing so, contravened Rule 23's text and thwarted its purpose.

A. The Weak Test Is Atextual.

A strong ascertainability requirement is firmly grounded in Rule 23's text. There is no way (at least in a damages class action) of determining whether a class representative's claims are "typical" without reference to the actual claims and circumstance of the other would-be class-members. FED. R. CIV. P. 23(a)(3). Likewise, to determine if "questions of law or fact common to class members predominate" over questions affecting individual members requires identification of those members, and identification of the common and unique questions embedded in their claims. FED. R. CIV. P. 23(b)(3).

A district court's order certifying a damages class action must "define the class *and* the class claims," and provide the "best notice that is practicable under the circumstances" to class members of these definitions. FED. R. CIV. P. 23(c)(1)(B), 23(c)(2)(B) (emphasis added). The "best notice" can hardly be determined without a meaningful up-front effort to ascertain the actual members of the class. Those are the people who will receive the notice and opportunity to opt out; if no class members can be specifically identified, then no one can be notified of the certified class. Moreover, Rule 23's distinction between the class itself and class claims is a particularly important distinction. It

indicates that the class cannot be an amorphous group of all people who share in the same operative factual allegations. Such a loose definition would really only be a definition of claims, not a definition of the individuals possessing those claims (*i.e.*, the class). The weak ascertainability test threatens this important distinction between the "class"—as an ascertainable group of individuals—and "class claims."

In this way, the weak ascertainability test also opens the door to the atextual mischief of the fail-safe class—*i.e.*, a class defined in terms of success on the merits (such as "All persons wrongfully denied Z by XY Corporation")—and thereby threatens the res judicata effect Rule 23 is intended to carry. *See* FED. R. CIV. P. 23(c)(3); Erin L. Geller, Note, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 FORDHAM L. REV. 2769, 2770, 2785–88 (2013).

With a fail-safe class, there is no way to know the size and composition of the class until the verdict. If the plaintiffs prove their case, the class is populated and bound; if not, the class is not populated and no one is bound, leaving plaintiffs' counsel free to subject the defendant to more litigation on the same claims. Geller, *supra*, at 2785–88. Thus, fail-safe classes convert Rule 23 into a powerful device to avoid the res judicata effect of judgments, despite the Rule's command that class judgments must be binding. *See* FED. R. CIV. P. 23(c)(3); *see also In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 n.19 (1st Cir. 2015) ("[A] fail-safe class is one in which 'it is virtually impossible for the Defendants to ever "win" the case, with the intended

class preclusive effects.'"). The Seventh Circuit's weak ascertainability test invites future fail-safe classes by removing a protection against them.

The surest way to protect against the mischief of the fail-safe class is to apply, at the certification stage, a meaningful ascertainability test. Geller, *supra*, at 2808-09 ("Simply put, fail-safe classes are not ascertainable because they are not capable of identification prior to final judgment."). Administratively feasible methods for determining who meets objective criteria for class membership allow the court to police this specific abuse of the class action procedure. The weak test discards this protection.[2]

B. The Weak Test Compromises Economy And Efficiency.

The weak ascertainability test cuts off the requirement of an "economical and 'administratively feasible' manner" for identifying class members. *Carrera*, 727 F.3d at 307 (citing *Marcus*, 687 F.3d at 594). Doing so creates an intractable problem: A court must permit a defendant to test an individual's eligibility for class membership—which is required

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[2] The Seventh Circuit's assurance that its test will not allow fail-safe classes is merely an *ipse dixit* totally lacking in empirical support. *See Mullins*, 795 F.3d at 660. An alleged injury *can be* an objective criterion—under the Seventh Circuit's formulation of ascertainability—for including someone in a class. But without reliable and administratively feasible methods for determining who satisfies the criterion, what analytical barrier stands in the way of certifying a fail-safe class? The strong ascertainability test functions as such a bar.

under the rigorous class certification analysis called for in *Comcast*, 133 S. Ct. at 1432–35 and *Wal-Mart*, 131 S. Ct. at 2551–52—but the court need not have procedure in place to guarantee efficiency and economy in that process. That is a formula which achieves the opposite of what Rule 23 as a whole is intended to achieve: the efficient collective adjudication as a fair and less costly substitute for individual proceedings. Instead, it produces a hideous combination of collective adjudication on behalf of an abstract hypothetical class, with time-consuming and expensive individual or administrative proceedings to determine who is or is not a member.

It is no answer to allow potential class members to submit conclusory, self-serving affidavits declaring themselves to meet class eligibility requirements without objective supporting proof. Under *Comcast* and *Wal-Mart*, defendants have the right to test these affidavits through cross-examination. But individual cross-examinations of every class member will create a series of expensive and time-consuming mini-trials. Such proceedings will defeat the efficiency the class device is supposed to achieve, while adding to the already tremendous settlement pressure that class actions heap upon defendants. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (recognizing that class actions create the "risk of 'in terrorem' settlements"; "[f]aced with even a small chance of a devastating loss, defendants [are] pressured into settling questionable claims"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's

decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (recognizing that class certification results in "settlements induced by a small probability of an immense judgment").

Such problems are an unnecessary affront to Rule 23's purpose of providing a comparatively inexpensive, efficient, and convenient alternative to individual litigation. *Cf. Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) ("[E]fficiency and economy of litigation . . . is a principal purpose of the procedure."); 7A Charles Alan Wright, et al., FEDERAL PRACTICE & PROCEDURE § 1751 (3d ed. 2005) ("The obvious advantage of the representative suit was that it was far cheaper and more convenient to maintain. . . ."). Rule 23, when read as an integrated whole, prevents class certification in cases burdened by such time-consuming and expensive features.

These problems and burdens can be avoided by requiring reliable and administratively feasible methods for identifying class members. If, for example, class eligibility turns on receipts or sales records—instead of self-serving and unreliable affidavits—the process for determining eligibility becomes far more objective and streamlined. And doubts regarding eligibility can be more summarily answered.

III. THE WEAK ASCERTAINABILITY TEST THREATENS SUBSTANTIVE RIGHTS.

The burdens in administering a class whose membership is not determinable by administratively feasible methods are likely to threaten defendants' substantive rights by (1) coercing settlements and (2) increasing the likelihood that *cy pres* relief will be necessary. This is contrary to the Rules Enabling Act, which prohibits any interpretation of Rule 23 that would "enlarge or modify any substantive right." 28 U.S.C. § 2072; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999) (adopting a "limiting construction" for Rule 23 to "minimize[] potential conflict with the Rules Enabling Act"). Difficulties in procedure in this context threaten to overwhelm substance.

First, there is a real danger that district courts applying the weak ascertainability test will attempt to lessen their own burdens by cutting corners at defendants' expense. For example, courts will limit defendants' right to cross-examine witnesses on conclusory affidavits. The Rules Enabling Act forbids such an outcome. If district courts certify classes through such shortcuts, substantive rights will suffer: defendants will face overwhelming potential liability without ever having had the chance to test class members' eligibility for class membership. Classes will be certified, and many defendants will succumb to the pressure to settle even unmeritorious claims. *See AT&T Mobility*, 131 S. Ct. at 1752; *Shady Grove Orthopedic Assocs.,* 559 U.S. at 445 n.3 (Ginsburg, J., dissenting); *In re Rhone-Poulenc Rorer*, 51 F.3d at 1298. It does no good to defer an

examination of ascertainability until after certification because most class actions settle upon certification. Practically, without a strong ascertainability examination prior to certification, the class action will become a device to transfer wealth even in cases without merit, not a procedural device to effect compensation in cases that have merit.

Second, the weak ascertainability test increases the chance that a class will be amorphous and unidentifiable at the resolution of the case. If a class is ill-identified at the certification stage, there is little assurance that it will be present and fully populated when the case settles or a jury reaches a plaintiffs' verdict. Class actions are already plagued by low rates of distribution of damages and settlement proceeds. Logically, that problem intensifies in cases where the class cannot be readily identified at the certification stage.

Accordingly, the weak ascertainability test increases the chance that district courts will have to resort to *cy pres*—*i.e.*, paying unclaimed portions of class judgments and settlements to third parties (such as charities) related to the interests of the class. The use of *cy pres* has exploded in recent years. At least 65 *cy pres* awards were made in federal class actions from 2001 to 2008. Martin H. Redish, et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 652–61 (2010).

The explosion of the *cy pres* practice is a travesty for substantive rights. Among other defects, the use of *cy pres* transforms "the underlying

substantive law from a compensatory framework into the practical equivalent of a civil fine." *Id.* at 644. Courts invoke *cy pres* even though "no legislative body has expressly chosen to abandon its compensatory enforcement mode in favor of some directive of a charitable contribution as punishment for a defendant's unlawful behavior." *Id.* at 623. And resort to *cy pres* as an alternative to class identification raises serious due process concerns. *See Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (mem.) (statement of Roberts, C.J.).

Under the Rules Enabling Act, Rule 23 does not—and cannot—furnish a substantive legal basis for "coercively transfer[ing] [a] defendant's money not as a form of compensation for injuries suffered but as a form of punishment." Redish, *supra*, at 646. Yet, that is precisely what occurs when there are not enough class members at the resolution of the case to claim the damages or settlement proceeds.

This outcome can be avoided through procedures that more reliably and objectively identify class members at the certification stage through administratively feasible methods.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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