No. 19-503

IN THE

Supreme Court of the United States

APACHE CORPORATION,

Petitioner,

v.

BIGIE LEE RHEA,

Respondent.

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

BRIEF IN OPPOSITION

BRADLEY E. BECKWORTH
Counsel of Record
TREY DUCK
JAMES E. WARNER III
NIX PATTERSON, LLP
3600 N. Capital of Texas Hwy.
Bldg. B, Suite 350
Austin, TX 78746
(512) 328-5333
bbeckworth@nixlaw.com
tduck@nixlaw.com
jwarner@nixlaw.com

Counsel for Respondent

November 18, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The interlocutory appeal mechanism offered under Rule 23(f), Federal Rules of Civil Procedure, gives the court of appeals "unfettered discretion" in deciding whether to review a district court's class certification order. This discretion is akin to that exercised by this Court in acting on a petition for certiorari.

The question presented is:

Did the Tenth Circuit act within its discretion in denying Petitioner's Rule 23(f) petition for permission to take an interlocutory appeal of the district court's order granting class certification—the primary point of which was to review whether the district court failed to consider the "ascertainability" of the proposed class—where the district court found the proposed class met the standard based on the facts developed in this case so far, leaving open the possibility that Petitioner could seek reconsideration of its certification decision after the completion of discovery.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT	4
A. Factual Background	4
B. Procedural Background	4
1. Respondent's Motion to Certify Class	5
2. The District Court's Certification Order	7
3. The Court of Appeals' Denial of Petitioner's Petition to Take an Interlocutory Appeal Under Rule 23(f)	9
4. The District Court's Admonition	10
REASONS FOR DENYING THE WRIT	11
I. The Real Question Presented—Whether The Court Of Appeals Acted Within Its Discretion In Denying The Rule 23(f) Petition For Interlocutory Appeal—Does Not Warrant Certiorari Review	11
II. This Case Is An Especially Inappropriate Vehicle For Deciding The Question Presented Due To The Lack Of A Substantive Record	13
III. The Facts Of This Case Satisfy Every "Ascertainability" Formulation Articulated By The Circuit Courts	15
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page(s)

Braver v. Northstar Alarm Servs., LLC,
329 F.R.D. 320 (W.D. Okla. 2018)...... 14, 15, 16

Briseno v. ConAgra Foods, Inc.,
844 F.3d 1121 (9th Cir.), *cert. denied sub nom. ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313, 199 L. Ed. 2d 206 (2017).. 15

Byrd v. Aaron's Inc.,
784 F.3d 154 (3d Cir. 2015)...................... 17

Cavazos v. Smith,
565 U.S. 1, 132 S. Ct. 2 (2011)................. 12

Carrera v. Bayer Corp.,
727 F.3d 300 (3d Cir. 2013)...................... 16, 17

ConAgra Brands, Inc. v. Briseno,
138 S. Ct. 313, 199 L. Ed. 2d 206 (2017)...1-2, 12, 15

Direct Digital, LLC v. Mullins,
136 S. Ct. 1161, 194 L. Ed. 2d 175 (2016)... 2, 12

Gonzalez v. Crosby,
545 U.S. 524, 125 S. Ct. 2641 (2005)........ 12

In re Cmty. Bank of N. Virginia Mortg. Lending Practices Litig.,
795 F.3d 380 (3d Cir. 2015)...................... 16, 17

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990).................................. 14

Martin v. Blessing,
571 U.S. 1040, 134 S. Ct. 402 (2013)........ 11-12

Mullins v. Direct Digital, LLC,
795 F.3d 654 (7th Cir. 2015)..................... 15

Page(s)

Naylor Farms, Inc. v. Chaparral Energy, LLC,
923 F.3d 779 (10th Cir. 2019).................. 6

North Carolina v. Rice,
404 U.S. 244 (1971).................................. 14

Procter & Gamble Co. v. Rikos,
136 S. Ct. 1493, 194 L. Ed. 2d 597 (2016)... 2, 12

Rhea v. Apache Corp.,
No. CIV-14-433-JH (E.D. Okla.).............. 10

STATUTES

Class Action Fairness Act of 2005,
28 U.S.C. § 1332(d) 5

RULES

Fed. R. Civ. P. 23 .... 3, 6, 11, 15

Fed. R. Civ. P. 23(a).................................... 5

Fed. R. Civ. P. 23(b)(3) 5

Fed. R. Civ. P. 23(c) 13

Fed. R. Civ. P. 23(f) ....*passim*

Fed. R. Civ. P. 23, Adv. Comm. Notes to
1998 Amend. 11

Fed. R. Civ. P. 23(f), Adv. Comm. Notes to
1998 Amend. 1

Sup. Ct. R. 10.. 2, 12, 14

Sup. Ct. R. 10(a) 3, 14

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* (9th ed. 2007)) 12

S. Shapiro, et al., *Supreme Court Practice* (10th ed. 2013) 14

INTRODUCTION

Petitioner invites this Court to micromanage an appellate court's discretionary decision to deny interlocutory appeal of a class certification order under Rule 23(f) of the Federal Rules of Civil Procedure. The Tenth Circuit's denial of permission for interlocutory appeal did not freeze in place the district court's legal rulings underlying class certification. Rather, this case is proceeding toward summary judgment and trial, and the district court left open the possibility that, if circumstances warranted, it would revisit its certification decision. Pet. App. 5a. After any final judgment by the district court in favor of the certified Class, Petitioner can appeal the judgment as a matter of right and raise any challenge to class certification at that time. And, after the court of appeals resolves that appeal, Petitioner has the right to file a petition for certiorari that actually presents the question it wants answered before this Court—assuming that question still exists and has still been resolved in favor of Respondent. As the drafters of Rule 23(f) noted, "many class certification decisions present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Fed. R. Civ. P. 23(f), Advisory Committee Notes to 1998 Amendment. That fact is self-evident here.

Perhaps that is why there is no evidence of this Court's willingness to entertain certiorari review of a court of appeals' discretionary denial of a Rule 23(f) petition. Indeed, as Petitioner concedes, on at least three occasions this Court has been asked to grant certiorari on petitions raising similar arguments as those raised here, and each time the Court has declined. *See ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313,

199 L. Ed. 2d 206 (2017); *Procter & Gamble Co. v. Rikos*, 136 S. Ct. 1493, 194 L. Ed. 2d 597 (2016); *Direct Digital, LLC v. Mullins*, 136 S. Ct. 1161, 1162, 194 L. Ed. 2d 175 (2016). As it has before, this Court should decline such an extreme request and deny the Petition.

First, the Tenth Circuit's denial of Petitioner's Rule 23(f) petition for interlocutory appeal is a poor vehicle for reviewing the substantive issues presented in the Petition. The only issue before the Tenth Circuit was whether to grant Petitioner's Rule 23(f) Petition for interlocutory appeal of the district court's certification order—***not*** whether class certification was appropriate. The Tenth Circuit's ruling was a *discretionary* decision on whether to allow an *interlocutory* appeal from an order that the district court left open to reexamination. That ruling, like most Rule 23(f) denials, was entered while discovery is ongoing and prior to summary judgment briefing and trial. Petitioner could still prevail on the merits. And even after a merits-based determination in Respondent's favor, the Tenth Circuit could side with Petitioner on any appeal. Accordingly, this Court's opinion on the question presented by Petitioner would not have a dispositive impact on the outcome of this case. Petitioner seeks review of a decision that, by its nature, lacks the "compelling" quality necessary for certiorari review of any order, much less a discretionary interlocutory one. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

Second, this case is an especially poor vehicle to resolve Petitioner's question presented because there is no substantive record. The Tenth Circuit decision up for review neither addresses the substantive question Petitioner presents nor has the Tenth Circuit ever substantively addressed that question. The limited

issue before this Court is whether the circuit court abused its broad discretion in denying a Rule 23(f) petition for interlocutory review. Petitioner asks the Court to blow past this narrow question by embellishing an alleged "split" amongst certain circuits related to the degree to which a district court must analyze whether the putative class is "ascertainable" under Rule 23. However, the Tenth Circuit has not taken a position on the issue and expressly declined to address it in the case at bar. Therefore, the Tenth Circuit's decision is not "in conflict with another United States court of appeals on the same important matter." *See* Sup. Ct. R. 10(a).

Third, even if the Tenth Circuit had addressed the question Petitioner presents, the "ascertainably" of the Class here would have satisfied the most stringent standard. Even assuming a split exists among circuit courts concerning "ascertainability"—and that the decision for review contributed to that split—such conflict is thin, and the present case satisfies even the most stringent standard among the circuit courts. The Petition rests on the faulty assumption that Respondent did not propose an administratively feasible way to ascertain class membership and the district court made no effort to address it. However, the record establishes just the opposite: (1) Respondent argued the class was ascertainable and presented evidence in support of this fact, (2) the district court made specific findings of ascertainability in its order granting class certification, (3) Petitioner continued to challenge the district court's ascertainability findings, and (4) the district court reiterated its conclusions regarding ascertainability in subsequent orders. Petitioner has *conceded* the class could be ascertained through use of its own business records. Accordingly, to the extent necessary, there exists both objective criteria

and an administratively feasible way of identifying putative class members, meaning an opinion by this Court on the Petition's question presented would have no impact on the outcome of this particular case.

STATEMENT

A. Factual Background

Respondent owns royalty interests in natural gas wells located in Oklahoma, from which Petitioner markets natural gas. Pet.App. 9a. He alleges that, for more than a decade, Petitioner systematically employed a uniform royalty payment methodology that failed to pay him and other royalty owners (the Class) the "best price" available for the minerals produced from their wells, in violation of certain express and implied duties in his lease. Pet.App. 9a. Respondent alleges Petitioner did this in three ways. First, Petitioner paid royalty to the Class in a manner that did not properly compensate the Class for all natural gas liquids (NGLs) at the best price available. Pet.App. 9a, 12a. Second, Respondent alleges Petitioner charged an obscene processing fee and conspired with a third-party company (Enable) to charge this fee in order to inflate said company's bottom line to the detriment of the Class. Pet.App. 10a. Third, for a subset of royalty owners in the Class (the "Fuel Gas Subclass" or "Subclass"), Respondent alleges Petitioner paid no royalty at all on gas Petitioner used, or allowed other third parties to use, as fuel to power certain machinery, including gas gathering systems, compressor stations, and processing equipment. Pet.App. 10a.

B. Procedural Background

Respondent initiated this action on behalf of himself and other similarly situated royalty owners in the

wells by filing an Original Petition in the Oklahoma District Court of Cherokee County. Pet.App. 9a. Respondent asserted causes of action under Oklahoma law for (i) breach of contract, (ii) tortious breach of contract, (iii) fraud (actual and constructive) and deceit, and (iv) an accounting. Pet.App.10a. The action was removed to the Eastern District of Oklahoma under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), where substantial discovery regarding both class-certification and merits issues ensued. Additional merits discovery is ongoing.

1. Respondent's Motion to Certify Class

On September 29, 2016, Respondent filed his Motion to Certify Class and Memorandum in Support, which sought certification under Rule 23(a) and (b)(3) of the Class and the Subclass, which he originally defined as:

> ***The Class***
>
> *All non-excluded persons or entities with royalty interests in wells with a Btu content of 1050 or higher where Apache Corporation marketed gas from the wells pursuant to the terms of the January 1, 1998 contracts between Transok, Inc. and Apache Corporation and/or the July 1, 2011 contract between Enogex Gathering & Processing LLC and Apache Corporation on or after January 1, 2000.*
>
> ***The Fuel Gas Subclass***
>
> *All non-excluded persons or entities entitled to share in royalty proceeds payable under any lease that contains an express provision stating the royalty will be paid on gas used off the lease premises (a Fuel Gas Clause) as set forth in Column G of Exhibit 1.*

> *The persons excluded from the Class and Fuel Gas Subclass are: (1) agencies, departments or instrumentalities of the United States of America and the State of Oklahoma; (2) publicly traded oil and gas exploration companies and their affiliates; (3) persons or entities that Plaintiff's counsel is, or may be prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct; and (4) officers of the Court involved in this action.*

Pet.App.14a.

Respondent contended this case was ideally suited for class treatment under Rule 23 and submitted substantial evidence in support of his contentions. First, Respondent presented a Lease Chart documenting a complete expert review and categorization of the 5,679 leases produced by Petitioner (Pet.App.13a), a method endorsed by the Tenth Circuit to establish the commonality factor under Rule 23. *See Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 795 (10th Cir. 2019).

Second, and particularly relevant to this proceeding, Respondent presented evidence establishing that Petitioner's own business records and royalty payment history showed exactly who the class members are, and that utilization of those records is a recognized method in the Tenth Circuit for identifying class members. *See* Answer in Opp. to Pet. for Permission to Appeal at 6, *Apache Corp. v. Rhea*, No. 19-602 (10th Cir., filed May 30, 2019) (hereinafter "Answer in Opp."). Specifically, Petitioner's own records and those of its processing company, Enable, objectively showed those wells and royalty owners that were subject to Petitioner's improper royalty payment practices. *See*

id. at 13. Respondent's expert declared she used this information (i.e., Petitioner's own records) to identify which wells met the proposed class definition and to calculate royalty owners' damages in a manner that can be applied class-wide. *See id*. The district court approved this methodology in certifying the class.

Petitioner also endorsed this method in an earlier motion seeking to transfer venue. There, in an effort to allege that an insufficient number of class members resided in the Eastern District of Oklahoma, Petitioner used its own internal **"database of wells and royalty owners"** to **"ascertain"** the putative class members that owned royalty interests in wells with a Btu content of 1050 or higher. *See id.* at 6.

2. The District Court's Certification Order

On February 15, 2019, the district court (Heaton, J.) issued an order granting Respondent's Motion to Certify. Pet.App.10a. Pursuant to its discretion, the district court determined Respondent's already narrow class definition should be narrowed further to avoid including those wells whose gas could not be not processed. Pet.App.20a-21a. This was done not out of concerns about ascertainability, but rather to tailor the class definition to the narrow scope of Respondent's allegation that Petitioner failed to pay royalty on *processed* gas. *See id*. Respondent accordingly, submitted a modified class definition limited to persons or entities with royalty interests "in wells upstream of a processing plant." Pet.App.4a.

The district court accepted Respondent's modified class definition and certified a class that included:

> *All non-excluded persons or entities with royalty interests in wells upstream of a processing plant with a Btu content of 1050 or*

> *higher and where Apache Corporation marketed gas from the well pursuant to the terms of the January 1, 1998 contracts between Transok, Inc. and Apache Corporation and/or the July 1, 2011 contract between Enogex Gathering & Processing LLC and Apache Corporation on or after January 1, 2000.*

Pet.App. 6a. Petitioner objected to the modified class definition on the grounds that it resulted in "an unascertainable, overbroad class," because the manner in which natural gas collection and processing systems operate precludes a definitive finding that, based on any given well's location relative to the processing plant, the well's gas was actually processed. Pet.App.4a. However, the district court dismissed Petitioner's contentions as "sufficiently remote and speculative [such] that it should not bar the certification of the proposed class." Pet.App.5a.

Notably, the district court concluded:

> *If, after further discovery, there is evidence suggesting that a significant portion of gas produced from wells upstream of processing plants was not processed, then a motion to decertify or redefine the class* ***may be*** *appropriate. On the present submissions, however, the court concludes that possibility is* ***sufficiently speculative*** *that it does not render the proposed class definition problematic. It appears from defendant's current pay practices that* ***the concern is more theoretical than real.*** *Plaintiff's modified class definition adequately addresses the court's concerns raised in the prior order — that the class be*

> *restricted to wells whose gas was processed for the extraction of NGLs* (emphasis added).

Pet.App.5a.

The district court applied controlling precedent and reviewed and weighed the evidence, the parties' arguments, the nature and credibility of their conflicting expert reports and testimony, and their documents and materials in support, and concluded Respondent carried his burden in establishing that the proposed class should be certified.

3. The Court of Appeals' Denial of Petitioner's Petition to Take an Interlocutory Appeal Under Rule 23(f)

Petitioner then filed a petition under Rule 23(f) for permission to take an interlocutory appeal of the district court's class-certification order. The Tenth Circuit Court of Appeals (Lucero, Phillips, Carson, JJ.) unanimously denied the petition in a *per curiam* order, briefly explaining that the certification order did not meet any of the enumerated factors under Rule 23(f) that may warrant interlocutory review:

> We have carefully considered the district court's written order granting class certification, the parties' submissions, and the applicable legal authority. We conclude that the order does not sound the "death knell" of the claims, that the district court order does not constitute manifest error, and it does not present "an unresolved issue of law relating to class actions that is likely to evade end-of-case-review which is significant to the case at hand as well as to class action generally." . . .

> Accordingly, this matter is not appropriate for immediate review.

Pet.App.2a.

4. The District Court's Admonition

The issue of ascertainability arose again in a subsequent scheduling dispute between the parties. Despite the clear mandate set forth in the district court's certification order, Petitioner refused to cooperate with Respondent in sending timely notice to the Class. This compelled Respondent to file an application to modify the court's scheduling order. After hearing hours of oral argument from counsel, the district court entered an order granting Respondent's requested relief.

In addressing Petitioner's ascertainability argument for the *fourth time*, the district court stated:

> *The court is persuaded from the various submissions that the identity of these wells (i.e. ones upstream of a processing plant, with the necessary BTU content and with production during the pertinent time frame), with a specificity sufficient to support notice to the class, is both* ***"knowable"*** *and* ***reasonably ascertainable****.*

Rhea v. Apache Corp., No. CIV-14-433-JH (E.D. Okla.) (Dkt. No. 339) (emphasis added).

By doing so, the district court reiterated its conclusions that, (1) the subject Class was ascertainable and (2) class members could be readily identified through documents in Petitioner's possession, custody, or control. Petitioner neglected to inform this Court of this latest development. But, in any event, this further belies Petitioner's contentions that Respondent failed to present a viable method by which the subject Class

could be ascertained and that the district court failed to consider the issue.

REASONS FOR DENYING THE WRIT

I. The Real Question Presented—Whether The Court Of Appeals Acted Within Its Discretion In Denying The Rule 23(f) Petition For Interlocutory Appeal—Does Not Warrant Certiorari Review

Petitioner mistakenly asserts that the question presented in this matter regards whether class certification was proper. However, that question was never before the court of appeals. The court of appeals did not decide whether to affirm or to reverse the certification of the Class, but whether to grant Petitioner permission to take a Rule 23(f) interlocutory appeal of the district court's class-certification order. And that decision—the one actually before this Court—does not warrant this Court's attention.

Rule 23(f) gives the courts of appeals broad discretion to develop their own standards, and that discretion will always be exercised in light of the particular facts of each case's evidentiary record. *See* Fed. R. Civ. P. 23, Advisory Committee's Notes to 1998 amendment ("The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari."). Likewise, any subsequent review in this Court will also turn on the particular facts of each case's evidentiary record, meaning any decision in this Court will be a precedential one-off—*i.e.*, limited to the question of whether an interlocutory appeal was appropriate on the particular facts of the present case. This Court is loath to engage in case-by-case error correction. *See Martin v. Blessing*, 571 U.S. 1040,

1045, 134 S. Ct. 402, 405 (2013) (Alito, J., respecting denial of the petition for writ of certiorari) ("Unlike the courts of appeals, we are not a court of error correction, and thus I do not disagree with the Court's refusal to review the singular policy at issue here."); *Cavazos v. Smith*, 565 U.S. 1, 11, 132 S. Ct. 2, 9 (2011) (Ginsburg, J., dissenting) ("Error correction is 'outside the mainstream of the Court's functions.'") (quoting E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice § 5.12(c)(3), p. 351 (9th ed. 2007)). That hesitancy should be exacerbated here where it cannot be said that the Court is correcting any error below, but is simply substituting its discretion for that of the court of appeals. *Cf.*, *Gonzalez v. Crosby*, 545 U.S. 524, 544 n.7, 125 S. Ct. 2641, 2655 (2005) (Stevens, J., dissenting) (noting a petition for certiorari seeking review of a denial of a certificate of appealability in the habeas context "has an objectively low chance of being granted" as "[s]uch a decision is not thought to present a good vehicle for resolving legal issues, and error correction is a disfavored basis for granting review, particularly in noncapital cases") (citing Supreme Court Rule 10).

Perhaps that is why this Court has expressed great reluctance to entertain certiorari from a circuit court's denial of a Rule 23(f) petition. As Petitioner readily admits, this Court has been presented with at least three opportunities to address the question Petitioner raises here and has declined review. *See ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313, 199 L. Ed. 2d 206 (2017); *Procter & Gamble Co. v. Rikos*, 136 S. Ct. 1493, 194 L. Ed. 2d 597 (2016); *Direct Digital, LLC v. Mullins*, 136 S. Ct. 1161, 1162, 194 L. Ed. 2d 175 (2016). It should not do so now for the first time.

Moreover, the Tenth Circuit's denial of permission for interlocutory appeal does not freeze in place the district court's legal rulings underlying class certification. Rather, this case is proceeding toward summary judgment and trial, and the district court left open the possibility that, if circumstances warranted, it would revisit its certification decision. Pet. App. 10a-11a. *See also* Fed. R. Civ. P. 23(c) ("An order that grants or denies class certification may be altered or amended before final judgment.") Moreover, after any final judgment by the district court in favor of the Class, Petitioner can appeal the judgment as a matter of right and raise any challenge to class certification at that time. And, after the court of appeals resolves that appeal, Petitioner then has the right to file a petition for certiorari that actually presents the question it wants answered before this Court—assuming that question still exists and has still been resolved in favor of Respondent.

In sum, the procedural posture of a Rule 23(f) decision presents a poor vehicle for addressing substantive questions like that posed in the Petition. Such questions are inherently obscured by the discretionary nature of the circuit court's decision to deny the 23(f) petition. And, given its interlocutory character, there is no concern that the district court's legal rulings regarding class certification will not arise again, obviating the need for this Court's intervention. Accordingly, certiorari is inappropriate.

II. This Case Is An Especially Inappropriate Vehicle For Deciding The Question Presented Due To The Lack Of A Substantive Record

Beyond the general problems posed by a request to review a Rule 23(f) petition, this case is an especially

poor vehicle to resolve the question presented because the decision up for review does not actually address the question presented.

As noted herein, despite any perceived split among the circuits courts on the issue of ascertainability versus "heightened ascertainability," "[t]he Tenth Circuit has not spoken on this requirement . . . ." *Braver v. Northstar Alarm Servs., LLC*, 329 F.R.D. 320, 334 (W.D. Okla. 2018). And the Tenth Circuit certainly did not say anything on the matter in its decision here. As such, the Tenth Circuit cannot be said to have "decided an important question of federal law"—much less decided that question in a way that "conflict[s] with the decision of another United States court of appeals" or "a state court of last resort." *See* Sup. Ct. R. 10(a). Nor, given the discretionary nature of the Rule 23(f) decision, can the Tenth Circuit's denial of this interlocutory appeal be deemed such a radical departure from the "accepted and usual course of judicial proceedings." *Id.*[1] Accordingly, there is nothing about the Tenth Circuit's decision that warrants review according to the reasons outlined in Rule 10. Any decision from this Court would be tantamount to "advising what the law would be upon a hypothetical state of facts" in clear contravention of its rule against advisory opinions. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (citing *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)); *see also* S. Shapiro, et al., *Supreme Court Practice* at 249 (10th ed. 2013) (noting that Certiorari is not appropriate where resolution of the

---

[1] Petitioner's claim that a split of authority exists as to the "ascertainability" requirement—*i.e.*, that reasonable courts have differed on the matter—also belies any argument that the Tenth Circuit's decision sanctioned such a radical departure by the district court.

question presented is "irrelevant to the ultimate outcome of the case before the Court").

Moveover, because the Tenth Circuit did not address the question that Petitioner wants answered, there is no substantive record for this Court to review or in which to find error with respect to the Tenth Circuit's ruling. Therefore, this case is an especially poor vehicle for Petitioner's question presented, beyond the general problems posed by a request to review a Rule 23(f) denial.

III. The Facts Of This Case Satisfy Every "Ascertainability" Formulation Articulated By The Circuit Courts

Notwithstanding the existence of any circuit split, this case would be an improper vehicle for addressing it because the district court's finding would be correct under even the most stringent test from any circuit court.

Although not enumerated in Rule 23, some courts require that a class definition be "precise, objective, and presently ascertainable." *Braver v. Northstar Alarm Servs., LLC*, 329 F.R.D. 320, 334 (W.D. Okla. 2018) (citation omitted). Others have rejected this requirement. *See, e.g., Briseno v. ConAgra Foods, Inc*., 844 F.3d 1121, 1126 (9th Cir.), *cert. denied sub nom. ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313, 199 L. Ed. 2d 206 (2017). They simply note Rule 23 carries an implicit requirement that a class must be defined clearly and that membership be defined by objective criteria. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015). Stated above, the Tenth Circuit has not spoken on this requirement, although district courts within the circuit have applied a standard of ascertainability which requires: (1) that

the class be defined with reference to objective criteria, and (2) a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. *See Braver,* 329 F.R.D. at 334. In this regard, "[t]he ascertainability requirement is generally satisfied where such business records can be used to identify the class." *See id*.

Even those decisions cited by Petitioner that have adopted a so-called "heightened ascertainability" standard (a position it urges here) observe that a putative class may show ascertainability through the defendant's business records. *See Carrera v. Bayer Corp*., 727 F.3d 300 (3d Cir. 2013). In *Carrera*, a case Petitioner heavily relies upon, the plaintiff sought to certify a nationwide consumer class action against Bayer for deceptive advertising practices regarding a weight loss pill. However, Bayer did not sell the pills directly to consumers but through retail stores, meaning it had no list of purchasers. Since consumers likely did not retain receipts of their purchases, the plaintiff proposed two ways to ascertain the class: search retailer records of online sales or solicit affidavits from prospective class members attesting they purchased the pill. The Third Circuit held the plaintiff had not met his burden of showing ascertainability because he failed to present evidence showing the first option could identify a single purchaser of the pill and the second method would result in too much individualized inquiry. The court remanded the case to determine whether any class members could be identified through sales records. *Id*. at 308, 312.

In *In re Cmty. Bank of N. Virginia Mortg. Lending Practices Litig*., 795 F.3d 380 (3d Cir. 2015), a post-*Carrera* decision, the plaintiffs brought a putative

class action against a bank and others alleging the existence of an illegal home equity lending scheme. Addressing ascertainability, the Third Circuit noted that case did not present the "evidentiary problems" at issue in *Carrera* because the defendant "possesse[d] all of the relevant bank records needed to identify the putative class members." *See id.* at 397. Then, the court noted, the *Carrera* evidentiary inquiry could readily be satisfied by a process that would "consult [the bank's] business records and then follow a few steps to determine whether the borrower is the real party in interest." *See id*.

Shortly after *Carrera*, the Third Circuit *reversed* the denial of class certification on ascertainability grounds in *Byrd v. Aaron's Inc*., 784 F.3d 154 (3d Cir. 2015). The class in *Byrd* included purchasers or lessees of computers who had direct, documented contacts with the defendant, along with their "household members" who had no such direct relationship but nonetheless suffered the same harm. The *Byrd* court held the inclusion of "household members" did not derail class certification because "household members" is a phrase that is easily defined and not inherently vague. *See id*. at 170-71.

Thus, even assuming there is a material difference of opinion between the circuits over the (implied) element of ascertainability, the Class's evidence here satisfies the most stringent of those standards and further demonstrates that this case is not a suitable vehicle for this Court's input.

As discussed *supra*, Respondent presented substantial evidence demonstrating that the class members and their damages were ascertainable from Petitioner's and Enable's own business records, which are kept in the ordinary course of business. Each putative class

member was identified according to their royalty, or decimal, interest in a well, which determined their allocation of royalty (or damages) related to a particular well. As further noted, Respondent presented evidence in chart-form that Petitioner had produced 5,679 class leases. It is thus undisputed that Petitioner maintains historic royalty payment data related to each well, which identifies each class member in every well.

Moreover, in seeking an earlier change of venue, Petitioner *confirmed* the ascertainability of class members by using its own internal "database of wells and royalty owners" to "ascertain" the putative class members that owned royalty interests in wells with a Btu content of 1050 or higher. In addition, discovery is still ongoing. If necessary, the parties may obtain information through discovery from other working interest owners in the wells related to any class members.

In light of the above, the district court found the subject Class was ascertainable, dismissing Petitioner's concerns as "more theoretical than real" and "sufficiently speculative [as to] not render the proposed class definition problematic." Pet.App. 5a. The court later reiterated its conclusion and found Petitioner was in possession of the business records necessary to further identify class members. Based on an abundance of evidence, the district court found that the class definition is narrow, precise, properly based on objective criteria, and was administratively feasible.

Thus, this case does not pose a significant issue as to ascertainability. If this Court were interested in addressing ascertainability, as Petitioner requests, this simply is not the right case through which to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BRADLEY E. BECKWORTH
Counsel of Record
TREY DUCK
JAMES E. WARNER III
NIX PATTERSON, LLP
3600 N. Capital of Texas Hwy.
Bldg. B, Suite 350
Austin, TX 78746
(512) 328-5333
bbeckworth@nixlaw.com
tduck@nixlaw.com
jwarner@nixlaw.com

Counsel for Respondent

November 18, 2019