No. 16-1221

IN THE

Supreme Court of the United States

CONAGRA BRANDS, INC.,
Petitioner,

v.

ROBERT BRISEÑO, ET AL.,
Respondents.

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

SUPPLEMENTAL BRIEF IN OPPOSITION

ADAM J. LEVITT
AMY E. KELLER
DICELLO LEVITT & CASEY LLC
Ten North Dearborn Street
Chicago, IL 60602
(312) 214-7900
alevitt@dlcfirm.com
akeller@dlcfirm.com

ARIANA J. TADLER
HENRY KELSTON
DAVID AZAR
MILBERG LLP
One Penn Plaza
New York, NY 10119
(212) 594-5300
atadler@milberg.com
hkelston@milberg.com
dazar@milberg.com

SAMUEL ISSACHAROFF
Counsel of Record
40 Washington Square South
New York, NY 10012
(212) 998-6580
si13@nyu.edu

ROBERT H. KLONOFF
2425 S.W. 76th Ave.
Portland, OR 97225
(503) 291-1570
klonoff@usa.net

Counsel for Respondents Briseño, et al.

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

ARGUMENT

Pursuant to Supreme Court Rule 15, Respondents file this Supplemental Brief in Opposition to alert the Court to an important new case that further repudiates Petitioner's claim of an entrenched Circuit conflict.

On July 5, 2017, Petitioner filed its Reply Brief which sweepingly argued that: 1) since the filing of the Petition, the putative Circuit conflict "has only gotten worse," R.Br. at 1; and 2) that based on one opinion, the Second Circuit had solidified its position in opposition to the Ninth Circuit in the present matter and to the Seventh Circuit in *Mullins v. Direct Digital*, *LLC*, 795 F.3d 654 (7th Cir. 2015), R.Br. at 3.

As to the argument by both the Ninth Circuit and Respondents that this misreads the Second Circuit law, Petitioner responded categorically and colorfully: "That's, well, not true." *Id. Accord* Pet. 14 n.5 (more concisely: "[N]ot true."). The Second Circuit was instead presented as Exhibit A for the key claim that "[t]his entrenched split isn't going away." R.Br. at 4. *Accord* Pet. 27 (any "doubts" about "the scope" of the Circuit split "are gone now").

A mere two days after Petitioner filed its Reply Brief, on July 7, 2017, however, the Second Circuit definitively weighed in on its own behalf with a long opinion in *In re Petrobras Securities*, No. 16-1914, 2017 WL 2883874 (2d Cir. July 7, 2017), in a manner that conclusively undermines Petitioner's central "Circuit split" contention. Following the critical cases from the Seventh and Ninth Circuits—*Mullins* and the present case—the Second Circuit held that "a free-standing administrative feasibility requirement is neither compelled by precedent nor consistent with Rule

23 . . . ." *Id.* at *8. The Second Circuit went on to expressly reject the heightened ascertainability standard that had supposedly been the entrenched law of that Circuit. Instead, the court ruled,

> In declining to adopt an administrative feasibility requirement, we join a *growing consensus* that now includes the Sixth, Seventh, Eighth, and Ninth Circuits. *See Briseno,* 844 F.3d at 1123; *Sandusky* [*Wellness Center*, *LLC v. Medtox Scientific*, *Inc.*], 821 F.3d [992,] 995-96 [(8th Cir. 2016)]; *Rikos v. Procter & Gamble* Co., 799 F.3d 497, 525 (6th Cir. 2015), *cert. denied,* – U.S. –, 136 S. Ct. 1493 (2016); *Mullins v. Direct Digital*, *LLC,* 795 F.3d 654, 657-58 (7th Cir. 2015), *cert. denied*, – U.S. –, 136 S. Ct. 1161 (2016); *see also Byrd* [*v. Aaron's Inc.*, 784 F.3d [154,] 177 (3d Cir. 2015) (Rendell, J., concurring) ("suggest[ing]" that the Third Circuit "retreat from [its] heightened ascertainability requirement" by eliminating the administrative feasibility prong).

Id. at *9 (emphasis added). Indeed, the Second Circuit quoted the Ninth Circuit decision below as having correctly interpreted Circuit case law, including that of the Second Circuit. *Id.* at *10 n.17.

Again following the Seventh and Ninth Circuits (including reliance on the same academic commentary), the Second Circuit found that neither the text nor the structure of Rule 23 could be reconciled with a heightened ascertainability requirement. *Id.* at *8. In tandem with the law that is settling in all courts, the Second Circuit law is no longer a subject of dispute:

> The ascertainability requirement, as defined in this Circuit, asks district courts to consider

> whether a proposed class is defined using objective criteria that establish a membership with definite boundaries. This modest threshold requirement will only preclude certification if a proposed class definition is indeterminate in some fundamental way.

Id. at *12.

As stated in the Brief in Opposition, this is an area where the courts are working through new doctrine. In light of what the Second Circuit terms the "growing consensus," this is precisely an area where the law should be permitted to percolate before premature, and perhaps unnecessary, intervention from the Court. In particular, given the tension within the Third Circuit, the important developments in other Circuits, and the pendency of cases in the Third Circuit that offer a chance for examination of the developing law, there will be time enough for review if conflict persists—something that appears to be an increasingly remote prospect.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

ADAM J. LEVITT
AMY E. KELLER
DICELLO LEVITT & CASEY LLC
Ten North Dearborn Street
Chicago, IL 60602
(312) 214-7900
alevitt@dlcfirm.com
akeller@dlcfirm.com

ARIANA J. TADLER
HENRY KELSTON
DAVID AZAR
MILBERG LLP
One Penn Plaza
New York, NY 10119
(212) 594-5300
atadler@milberg.com
hkelston@milberg.com
dazar@milberg.com

SAMUEL ISSACHAROFF
Counsel of Record
40 Washington Square South
New York, NY 10012
(212) 998-6580
si13@nyu.edu

ROBERT H. KLONOFF
2425 S.W. 76th Ave.
Portland, OR 97225
(503) 291-1570
klonoff@usa.net

Counsel for Respondents Briseño, et al.

July 11, 2017