No. 19-80157

IN THE
United States Court of Appeals
for the Ninth Circuit

SNAP INC. et al.,
Petitioners,
v.
JAMES ERICKSON, et al.,
Respondents.

On Appeal from the United States District Court
for the Central District of California
No. 2:17-cv-03679-SVW-AGR
District Judge Stephen V. Wilson

MOTION FOR LEAVE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' RULE 23(f) PETITION

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December 10, 2019

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel certifies that the Chamber of Commerce of the United States of America is not a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

Dated: December 10, 2019

/s/ *Catherine E. Stetson*
Catherine E. Stetson

The Chamber of Commerce of the United States of America (the Chamber) respectfully moves for leave to file a brief as *amicus curiae* in support of Petitioners' Rule 23(f) petition. Petitioners have consented to the filing of this brief, and counsel for Respondents has not indicated their consent or opposition to this motion.

The Federal Rules of Appellate Procedure generally provide that parties seeking leave to file *amicus* briefs state (1) "the movant's interest" and (2) "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." *See* Fed. R. App. P. 29(a)(3) (*amicus* briefs during consideration of case on merits); (b)(3) (*amicus* briefs during consideration of whether to grant rehearing). The Chamber has both a strong interest in the outcome of the petition and a unique perspective given the diversity and experience of its members.

First, the Chamber has a strong interest in the outcome of the petition given the broader implication for class-action lawsuits that the District Court's underlying certification order augurs. The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly the interests of more than three million businesses of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters

before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases raising issues of concern to the nation's business community, such as this one.

The petition raises fundamental questions of class-action practice reaching far beyond the parties to this case. First and foremost, the petition asks whether *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), permits otherwise-out-of-time litigants to serve as lead class counsel after certification has already been denied when those latecomers seek to join an "existing action." That question carries important consequences for the bench and bar alike. *China Agritech* adopts a bright-line rule that precludes the invention of circumstance-specific exceptions, including the District Court's "existing action" exception. The petition also identifies other errors in the District Court's decision that warrant this Court's review to ensure the "rigorous analysis" required by Federal Rule of Civil Procedure 23, which in turn promotes the economy and efficiency of class litigation, as well as increasing certainty and providing clear, observable limits for plaintiffs, defendants, and courts alike. This is especially critical in the securities context because the federal courts are facing an explosion of unmeritorious securities claims proceeding on a class basis.

Second, the Chamber's brief would help this Court understand the issues raised when deciding whether to grant the petition. "Even when a party is very

well represented, an amicus may provide important assistance to the court." *Neonatology Assocs., P.A. v. Commissioner*, 293 F.3d 128, 132 (3d Cir. 2002); *see also, e.g., Palomar Med. Ctr. v. Sebelius*, 693 F.3d 1151, 1159 n.14 (9th Cir. 2012). "Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." *Neonatology Assocs.*, 293 F.3d at 1159 (quotation marks and citation omitted).

The Chamber's brief serves all these functions of a desirable *amicus* submission. The Chamber has "particular expertise" in matters of class certification given the diversity and experience of its membership, as well as the Chamber's unique ability to assess the effects of the District Court's reasoning in support of the underlying certification order. Further, the Chamber's arguments about the significance of the District Court's ruling focus on the broader-reaching doctrinal implications of that ruling for future class actions, in addition to the parties' focus on the particular facts of this case. And the Chamber seeks to explain the impact that this Court's decision whether to grant the petition may have on affected businesses and industry sectors.

For these reasons, the motion for leave to file an *amicus* brief in support of the petition for leave to appeal should be granted.

December 10, 2019

Respectfully submitted,

/s/ *Catherine E. Stetson*

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 700 words, exclusive of those items listed in Fed. R. App. P. 27(a)(2)(B) and Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

/s/ *Catherine E. Stetson*
Catherine E. Stetson

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on December 10, 2019.

/s/ *Catherine E. Stetson*
Catherine E. Stetson

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STATEMENT OF COMPLIANCE WITH RULE 29

No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Petitioners have consented to this filing, but counsel for Respondents have not responded with their position at the time of filing.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases raising issues of concern to the nation's business community, including in the Supreme Court case at the heart of this petition. *See* Br. of the Chamber of Commerce of the United States of America et al. as *Amici Curiae* in Support of Petitioner, *China Agritech v. Resh*, 138 S. Ct. 1800 (2018) (No. 17-432).[1]

[1] *Available at* https://bit.ly/2riNkw4.

This is just such a case. Notwithstanding the Supreme Court's recent *China Agritech* decision, which announced a "categorical" rule prohibiting the "stacking" of untimely putative class actions, the District Court certified a class on a latecoming motion from lead plaintiffs who filed claims only after a prior attempt at certification failed and the applicable statute of limitations had run. It did so by fashioning a new exception of uncertain scope for "new" litigants seeking to join "existing actions." That exception cannot be squared with *China Agritech*. The District Court's class certification order directly contravenes the rigorous analysis required by Federal Rule of Civil Procedure 23. And it frustrates the economy and efficiency Rule 23 is designed to foster. The Chamber and its members have a strong interest in ensuring that the federal district courts faithfully observe those standards.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court should grant review to address fundamental questions of class-action practice reaching far beyond the parties to this case. The petition asks whether *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), permits otherwise-out-of-time litigants to serve as lead class counsel after certification has already been denied when those latecomers seek to join an "existing action." That question carries important consequences for the bench and bar alike. Ensuring that *China Agritech* is applied with appropriate regard for the "rigorous analysis"

required by Rule 23 promotes the economy and efficiency of class litigation, as well as increasing certainty and providing clear, observable limits for plaintiffs, defendants, and courts alike.

This Court should also grant the petition because the District Court's "existing action" exception reflects manifest error. *China Agritech* adopts a bright-line rule that precludes the invention of freeform, circumstance-specific exceptions. Because the District Court does precisely what the Supreme Court has forbidden, this Court should grant review and reverse.

The District Court's errant *China Agritech* ruling was further exacerbated by its certifying a class based on similarly erroneous "statistical tracing" theory and "value based" damages model. Permitting a class to proceed against these compounded errors raises special concerns given the dramatic resurgence of unmeritorious securities classes nationwide.

ARGUMENT

I. Whether The "Categorical" *China Agritech* Rule Permits An "Existing Action" Exception Is A Significant Question Of Class Action Law Extending Beyond The Parties Here.

The petition asks whether a putative class may be certified by adding "new" lead plaintiffs to an "existing" suit when those plaintiffs had neither filed a complaint, nor sought to be lead plaintiff, nor sought to intervene, during the relevant statute of limitations. The District Court said yes. Because it made the

"procedural decision" to "reopen the lead plaintiff selection process" without addressing "the merits" of certification after the previous lead plaintiff, who had timely asserted claims, "withdrew for medical reasons," the District Court held that this case presented "none of the concerns regarding resuscitation of litigation" animating the *China Agritech* Court—an approach even the District Court admitted was "categorical." Op. 15–17.

That question is critically important for anyone on the receiving end of a class-action lawsuit. And the District Court got it wrong. *China Agritech*'s bright-line rule is straightforward and permits no "existing action" exception. If the District Court's ruling holds, similar proceeds will slide quickly and inexorably back to the pre-*China Agritech* status quo: defendants will face extended liability of indefinite duration, increasing both the uncertainty of potentially enormous legal risk and the attendant pressures to settle even otherwise-time-barred claims.

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, 700–701 (1979), requiring "rigorous analysis" before its procedures can be invoked as a result. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). Given their unique status, class actions raise unique challenges when applying legal rules fashioned with the traditional model of bilateral litigation in mind—including how

to apply limitations periods to successive claims. One such class-specific challenge is how to deal with the "stacking" of claims, when a putative class action is originally timely filed and a plaintiff then seeks to file another suit, whether individually or on a class basis, outside the limitations period.

Whether and how claims can be stacked in successive litigation is a critical and recurring question of law. The Supreme Court has specifically addressed tolling in the class-action context several times over the past half century. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) (permitting tolling for putative class members who timely intervene with additional claims after suit held inappropriate for class-action status); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) (extending *American Pipe* tolling to the filing of individual suits). Just last year, in *China Agritech*, the Court held that *American Pipe*–style tolling does *not* apply when the later-coming claims are brought on a class, rather than individual, basis. 138 S. Ct. 1800.

These issues persist for good reason: Stacking claims following an unsuccessful initial certification bid allow purported class members second (and third and fourth) chances to find a more-receptive court with indefinitely extended deadlines. That, in turn, reduces certainty, delays resolution of alleged wrongdoing, and increases the liability facing class defendants, directly contrary to "the efficiency and economy of litigation" that "is a principal purpose" of Rule 23

class action. *See American Pipe*, 414 U.S. at 553. Warding off the prospect for "serial relitigation," in which one putative class begets another (and another), is the animating thread running throughout Justice Ginsburg's eight-justice *China Agritech* majority opinion. 138 S. Ct. at 1808–09; *see also id.* at 1811 (Sotomayor, J., concurring) (joining the majority opinion only for cases governed by the Private Securities Litigation Reform Act of 1995). As *China Agritech* makes clear, "[t]he time to file individual actions once a class action ends is finite, extended only by the time the class suit was pending; the time for filing successive class suits, if tolling were allowed, could be limitless." *Id.* at 1809.

The federal courts of appeals are now starting to face pushback from plaintiffs seeking to circumvent *China Agritech*, whose recently announced rule is "unequivocal" in preventing latecomers from "piggyback[ing]" their out-of-time claims. *See Blake v. JP Morgan Chase Bank NA*, 927 F.3d 701, 709 (3d Cir. 2019) (rejecting attempt "to distinguish [plaintiffs'] case from *China Agritech*" because original lawsuit remained pending); *see also In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 915 F.3d 1, 17 (1st Cir. 2019) (holding that otherwise-time-barred class claims are not tolled even when certification had not been expressly denied because *China Agritech* "effectively ruled that the tolling effect of a motion to certify a class applies only to individual claims, no matter how the motion is ultimately resolved"). Whether the District Court's "existing action" exception can

be squared with *China Agritech* is similarly an important and recurring question of class-action practice that this Court should answer now.

II. The District Court's Decision Reflects Manifest Error.

The District Court correctly observed that "*China Agritech* embodies a categorical approach." Op. 17; *accord Blake*, 927 F.3d at 709 (calling *China Agritech* "unequivocal"). The rule the District Court actually applied, however, is anything but. Rather than hew to *China Agritech*'s bright line, the District Court instead recited various "circumstances"—that an earlier denial of class certification had been merely "procedural," not "on the merits"; and that the latecoming lead plaintiffs sought "to replace a class representative" who brought timely claims but "withdrew for medical reasons"—purportedly justified overlooking the since-lapsed deadline. Op. 16–17. That is, because the lead plaintiffs "intervened in an *existing* class action" rather than requesting "certification in a *new* (and otherwise-time-barred) lawsuit," "*China Agritech* is not properly applied." *Id.* at 16.

Not so. An "existing action" exception is precisely the sort of doctrinal chipping away that the Supreme Court expressly rejected. Simply put, "Rule 23 contains *no* instruction to give denials of class certification different effect based on the reason for the denial." *China Agritech*, 138 S. Ct. at 1809 n.5 (emphasis added). Once certification is denied, that "strips the suit of its character as a class action." *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1381 (11th Cir.

1998) (alterations omitted) (quoting Fed. R. Civ. P. 23(c)(1) advisory commitee's note to 1966 amendment). "At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Crown, Cork & Seal*, 462 U.S. at 354. That is true whether the denial is framed as "procedural" or "on the merits," and whether a court retains jurisdiction to later change course and order certification in appropriate circumstances. And there is "nothing inequitable" in furthering "putative class members' own interests in adequate representation, and the efficient adjudication thereof," by "affording district courts time to consider competing claims for class representation" simultaneously so that potential "deficiencies will be discovered and acted upon early in the litigation." *China Agritech*, 138 S. Ct. at 1809 n.5.

Worse, there is no obvious limiting principle to prevent the District Court's amorphous exception from ballooning further still. Under the District Court's theory, can "new" putative lead plaintiffs stack a latecoming class on top of "existing" proceedings when the original lead plaintiffs withdraw voluntarily? Or imagine that current lead plaintiffs later withdraw or are otherwise disqualified on "procedural" grounds. Could a court, yet again, "reopen" lead-plaintiff selection—potentially years after the statute of limitations had run—to allow for newcoming volunteers (and/or their successors)? The District Court's "existing action"

exception does not merely put a nose under the tent; it cuts a camel-size hole in its side.

The District Court's obvious error alone warrants reversal independent of the broader national implications discussed above. *See, e.g.*, *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1095 (9th Cir. 2018) (granting Rule 23(f) petition and reversing certification order when district court held unenforceable arbitration agreement that would have precluded class litigation contrary to the express holding of *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201 (9th Cir. 2016)). This Court should grant the Rule 23(f) petition and reiterate that *China Agritech* means what it says.

III. The District Court's Tracing and Superiority Rulings Contravene Rule 23's "Rigorous Analysis" Requirement.

The other issues Petitioners raise independently warrant this Court's consideration under Rule 23(f). Whether the Securities Act permits the "statistical tracing" countenanced by the District Court's certification order, Pet. 14–19, and whether proceeding with a legally uncertain "value based" damages model is the "superior" option over a nearly identical state-court action not so encumbered, *id.* at 19–22, likewise raise important questions for the practice of securities class-action litigation, for the reasons given in the Petition. And the District Court got it wrong on both counts, as Petitioners also explain.

Although certifying a class in the face of any one of these shortcomings counsels reversal, the cumulative error here reflects the all-too-common approach of district courts to elide the "rigorous analysis" mandated by Rule 23. *See, e.g.*, *Comcast Corp.*, 569 U.S. at 33–34. A cavalier approach to class certification is incompatible with federal courts' critical gatekeeping function.

In modern class litigations, "the certification decision is typically a game-changer, often the whole ballgame." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). The sweeping liability from an adverse judgment places enormous pressure on defendants to settle even dubious-on-the-merits claims. *See, e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 151 (2d Cir. 1987) (affirming grant of a $180 million class settlement despite the trial court "view[ing] plaintiffs' case as so weak as to be virtually baseless" and having granted summary judgment against plaintiffs who had opted out). In the typical case, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Sci.–Atlanta, Inc.*, 552 U.S. 148, 163 (2008). So unsurprisingly, "virtually all cases

certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010).

The consequences for failing to rigorously analyze putative classes are particularly acute in the securities context, where there has been a renewed explosion of low-quality class claims. Despite Congress's enactment of the Private Securities Litigation Reform Act of 1995 to address the then-growing problem of unjustified class suits, today's "securities class action system suffers from abuses eerily similar to those of the 1990s." U.S. Chamber Institute for Legal Reform, *A Rising Threat: The New Class Action Racket That Harms Investors and the Economy* 1 (Oct. 2018).[2] The numbers are staggering: Last year, one out of every dozen publicly traded companies could expect to face a securities class action, as will virtually every—85%—merger-and-acquisition deal worth at least $100 million. *Id.* at 1–4. This resurgence of securities classes is spiking: The number of suits filed in 2017 was 50% higher than in 2016, which is more than twice the annual average over the past two decades. *Id.* at 4. And this dramatic uptick appears to reflect a "new normal," as "data regarding 2018 securities class action filings show that the unprecedented rate of filings continued unabated." U.S. Chamber Institute for Legal Reform, *Containing the Contagion: Proposals to*

[2] *Available at* https://bit.ly/2E4204L.

Reform the Broken Securities Class Action System 1–4 (Feb. 2019).[3] Indeed, 2018 set a "new record" for securities filings—more than 440 new cases—roughly twice the number filed in 2014, and three times the average figure between 1997 and 2017. *Id.*

By improperly watering down Rule 23's threshold certification showing rather than man the floodgate, the District Court's decision threatens to exacerbate that perilous trend. This Court's review is urgently needed to stem the growing surge of unmeritorious securities class actions.

CONCLUSION

The petition for leave to appeal should be granted.

December 10, 2019

Respectfully submitted,

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[3] *Available at* https://bit.ly/345Rh4f.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,596 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

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