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

REPLY BRIEF FOR PETITIONER

TIMOTHY S. MCCONN
REAGAN W. SIMPSON
SHANE PENNINGTON
YETTER COLEMAN LLP
811 Main Street
Suite 4100
Houston, TX 77002
(713) 632-8000

MICHAEL L. BEATTY
Counsel of Record
BEATTY & WOZNIAK
216 16th Street
Suite 1100
Denver, CO 80202
(303) 407-4499
mbeatty@bwenergylaw.com

MARK BANNER
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON
320 South Boston Ave.
Suite 200
Tulsa, OK 74103-3706
(918) 594-0400

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

Respondent Bigie Lea Rhea does not deny the longstanding, deeply entrenched circuit split regarding the Question Presented. BIO 15-16. Nor does he dispute that, because of that circuit split, class certification—"the most significant decision rendered in … class-action proceedings," *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980)—often turns on venue. Pet.16. Apache's petition is about resolving that conflict, which is getting worse by the day.[1]

---

[1] *Compare Nicholas G. Belezos* v. *Bd. of Selectmen*, No. 17-12570, 2019 WL 6358247, at *6 (D. Mass. Nov. 27, 2019) (recognizing that it is a "prerequisite to class certification that a putative class be ascertainable; that is, 'it must be 'administratively feasible to determine whether a particular individual is a member.'" (quoting *Schonton* v. *MPA Granada Highlands LLC*, No. 16-12151, 2019 WL 1455197, at *3 (D. Mass. 2019))); *Rensel* v. *Centra Tech, Inc.*, No. 17-24500, 2019 WL 6170221, at *2 (S.D. Fla. Nov. 20, 2019) (denying renewed motion for class-certification where court had initially denied certification on ascertainability grounds and plaintiffs did not argue that the information in their renewed motion "was previously unavailable to them"); *Sellers* v. *Rushmore Loan Mgmt. Servs., LLC*, 941 F.3d 1031, 1039 (11th Cir. 2019) ("[A] plaintiff seeking to represent a proposed class must demonstrate that the class is adequately defined and clearly ascertainable." (internal

Attempting to dissuade this Court from granting review, Rhea argues (BIO 2) that this Court's intervention is unnecessary because

---

quotation marks omitted)); *Sandoe* v. *Bos. Sci. Corp.*, No. 18-11826, 2019 WL 5424203, at *4 (D. Mass. Oct. 23, 2019) ("A class cannot be certified under Rule 23 when class members are 'impossible to identify prior to individualized fact-finding and litigation.'" (quoting *Crosby* v. *Soc. Sec. Admin.*, 796 F. 2d. 576, 580 (1st Cir. 1986))); *Williams* v. *Potomac Family Dining Grp. Operating Co., LLC*, No. 19-1780, 2019 WL 5309628, at *8 (D. Md. Oct. 21, 2019) (dismissing class claims because of a single issue that raised "not only a commonality problem, but also a potential issue of 'ascertainability,' the "implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" (quoting *EQT Prod. Co.* v. *Adair*, 764 F.3d 347, 358 (4th Cir. 2014))); *and In re Loestrin 24 FE Antitrust Litig.*, No. 13-2472, 2019 WL 5406077, at *28 (D.R.I. Oct. 17, 2019) (denying certification where "there [wa]s no administratively feasible way to identify the consumers in the EPP class") *with Gomez* v. *J. Jacobo Farm Labor Contractor, Inc.*, No. 15-01489, 2019 WL 5787805, at *8 (E.D. Cal. Nov. 6, 2019) ("[T]he Ninth Circuit does not require that the proposed class also be 'administratively ascertainable.'" (quoting *Briseno* v. *ConAgra Foods, Inc.*, 844 F.3d 1121, 1123-26 (9th Cir. 2017))) and *Cline* v. *Sunoco, Inc. (R&M)*, No. 17-313, 2019 WL 4879187, at *3 (E.D. Okla. Oct. 3, 2019) ("[T]he Tenth Circuit does not require a separate ascertainability analysis ….").

Apache might prevail in the ongoing proceedings before the district court or an end-of-case appeal. But the Question Presented, which focuses on what Rule 23 and due process require *before* a class may be certified, is entirely unrelated to the ongoing *post-certification* proceedings. As a result, the contingencies Rhea identifies will not impede this Court's review.

Rhea's various vehicle objections also fail. Most rest on the mistaken premise that the Tenth Circuit's discretion under Rule 23(f) prevents this Court from reviewing the Question Presented. BIO 11-12. Apache anticipated that argument and explained at length in the petition (Pet.26-28) that *Dart Cherokee Basin Operating Co., LLC* v. *Owens*, 574 U.S. 81 (2014), refutes it. Rhea simply ignores Apache's argument and this Court's decision in *Dart*.

Rhea also claims (BIO 15-18) that the class would be ascertainable even under the stricter standard applied by the Third, Fourth, and Eleventh Circuits, but that is demonstrably false. Contrary to his claim (BIO 17-18) that the evidence already before the district court would allow him to identify class members with ease, Rhea recently admitted that he *cannot* identify the members of the class because "it is

impossible to tell during which month which well's gas was processed …."[2]

Rhea continues to insist that Apache's ascertainability concerns are "more theoretical than real," (BIO 18 (quoting App.5a)), but there is nothing theoretical about his now-admitted inability to offer an administratively feasible method for identifying class members or the resulting administrative problems that currently plague the district court's post-certification proceedings. Indeed, the only thing that remains theoretical, it seems, is the district court's certification-stage pledge (App.5a) to consider redefining or decertifying the class if these problems eventually arose (as they plainly have at this point).

The district court could not have certified this unmanageable class if it had demanded that Rhea offer an administratively feasible method for identifying class members *before* certification as the Third, Fourth, and Eleventh Circuits require. Instead, however, the district

---

[2] Tr. of Hrg. at 97:20-22, *Rhea* v. *Apache Corp.*, No. 14-433 (E.D. Okla. Oct. 15, 2019) ("Well, Mr. Beatty just told you, and he's right, that it is impossible to tell during which month which well's gas was processed …."); see also *id.* at 99:10-12 ("I cannot tell your Honor which gas from which well is actually processed because of the commingling.").

court rejected that standard in favor of the "deal-with-it-later" approach of the Second, Sixth, Seventh, and Ninth Circuits. The result is unmanageable class proceedings that defeat the efficiency goals Rule 23 is supposed to promote.

For the reasons explained in the petition, the Court should grant certiorari.

I. THIS CASE IMPLICATES AN ACKNOWLEDGED AND LONGSTANDING CIRCUIT SPLIT.

Rhea concedes, as he must, that the courts of appeals disagree regarding whether Rule 23 requires plaintiffs to prove the existence of an administratively feasible method for identifying class members before a district court may certify a Rule 23(b)(3) class action. BIO 15-16. Yet he urges this Court to look the other way because Apache "could still prevail on the merits" in the district court or in an end-of-case appeal to the Tenth Circuit. BIO 2. That argument fails for several reasons.

First, the presence of ongoing litigation weighs *in favor of* certiorari, not against it, because without immediate review, the parties may needlessly expend resources (or consider settlement) on a legally deficient claim.

Second, that this Court's ruling might not terminate the litigation is no bar to granting

certiorari. BIO 2. This Court routinely grants review from interlocutory orders that, like this one, raise important issues with widespread impact on other cases. See, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348 (2011); *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010); *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 561 U.S. 89, 95 (2010).

Third, Rhea's argument ignores the Question Presented, which focuses on whether Rule 23 and due process require *pre-certification* proof of ascertainability. Pet.i. The *post-certification* contingencies that Rhea identifies cannot change the fact that the district court certified this class despite Rhea's now-admitted inability to identify class members. See pp. 3-4 & n.2, *supra*.

Fourth, Rhea's treatment of post-certification review and pre-certification review as interchangeable ignores the dynamics of class-action litigation and their impact on due process interests. Sensitive to those dynamics, this Court routinely grants review of interlocutory decisions regarding class certification to ensure that courts undertake the rigorous analysis Rule 23 requires *before* certification skews settlement negotiations in favor of the class and, in reality, class counsel. See, *e.g.*, *Halliburton* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014); *Wal-Mart Stores, Inc.*, 564 U.S. at 348; *Comcast* v. *Behrend*, 569

U.S. 27, 32 (2013). It should do so here for the same reasons.

Fifth, there is no real danger that further proceedings below would moot this Court's review. Given Rhea's admitted inability to identify class members (see pp. 3-4 & n.2, *supra*) and the ongoing discovery in the district court related to that threshold issue (BIO 18), the proceedings below are unlikely to wrap up any time soon. Moreover, should certiorari be granted, Apache would ask the district court to stay proceedings pending this Court's review. There is no reason to suspect that the district court would not grant such a request.

Rhea's argument that the class at issue would be ascertainable even under the heightened standard applied in the Third, Fourth, and Eleventh Circuits is grossly misleading and demonstrably false. He repeatedly claims (BIO 3, 17-18) that evidence in the district court record would enable him to identify class members with ease. As Rhea acknowledges elsewhere in the brief in opposition (BIO 6-7), however, the evidence he relies on all relates to the *original* class definition that the district court ultimately *rejected* as overbroad.[3] BIO 7 (citing App.20a-

[3] Rhea's claim (BIO 3, 7, 18) that Apache "conceded" that the class was ascertainable is bizarre given Rhea's own emphasis (BIO 10) on Apache's

21a); Tr. of Hrg. at 98:3-5, *Rhea* v. *Apache Corp.*, No. 14-433 (E.D. Okla. Oct. 15, 2019) ("Judge, you can't certify a case where we didn't even have an opportunity to process this gas. [Apache] won that issue.").

Evidence regarding the ascertainability of a class the district court never certified proves nothing. What Rhea needs is any evidence that would permit him to identify the members of the certified class—the one limited to wells "upstream of a processing plant" such that (under the district court's theory at least) they produced gas that was "likely" processed. App.5a. As already mentioned, Rhea has admitted that he has *no* such evidence. See pp. 3-4 & n.2.

II. RHEA'S ATTEMPTS TO CONJURE VEHICLE PROBLEMS FAIL.

Apache does not "ask[] this Court to blow past th[e] narrow question" of "whether the

---

sustained insistence throughout this litigation that the class is unascertainable. In any event, as Rhea acknowledges (BIO 7) in the brief in opposition, the passage containing the supposed concession is lifted from Apache's briefing on a "motion seeking to transfer venue" filed *long* before the class definition that the district court eventually accepted had even made its first appearance in this case. Apache's use of the term "ascertainable" in that different context conceded nothing about the parties' current dispute.

circuit court abused its broad discretion in denying [Apache's] Rule 23(f) petition" as Rhea alleges. BIO 3. On the contrary, Apache took that question head on in a three-page section of the petition (Pet.26-28) entitled "The Tenth Circuit abused its discretion in denying permission to appeal." As that discussion demonstrates, this Court considered and rejected an argument nearly identical to Rhea's in *Dart*, 574 U.S. at 81.

Dart held that while the court of appeals' discretion over requests for permissive interlocutory appeals is broad, it "is not rudderless." *Dart*, 574 U.S. at 90 (internal citations omitted). As the petition explains (Pet.27-28), because the Tenth Circuit based its rejection of Apache's Rule 23(f) petition on a manifestly "erroneous view of the law," it "necessarily" abused its discretion. That is enough to permit this Court to address the Question Presented. Pet.28 (discussing *Dart*, 574 U.S. at 90-91).[4]

Despite all of this, the brief in opposition does not even mention *Dart* or Apache's argument that the Tenth Circuit's rejection of

---

[4] *Dart* also refutes Rhea's attempt (BIO 10-11) to frame Apache's petition as seeking mere "error correction."

Apache's Rule 23(f) petition was an abuse of discretion. That is telling.[5]

Rhea's remaining vehicle objections also fail. The Tenth Circuit's order does not, for example, turn on factual considerations unique to this case as Rhea claims. BIO 11. The Tenth Circuit gave its reasons for rejecting Apache's appeal, and they were plainly rooted in its mistaken view of the law, not the facts of this case. App.1a-2a. This Court should take the Tenth Circuit at its word.

Rhea's argument (BIO 1, 12) that review is unwarranted because the Court has denied certiorari in past cases fails for two reasons. First, Rhea does not dispute that this case is a better vehicle than those past cases. See Pet.20-23. Second, he ignores that "this Court has rigorously insisted" that a denial of certiorari

---

[5] To the extent that the Tenth Circuit viewed the ascertainability issue as not "likely to evade end-of-case-review," App. 2a, it was mistaken. It is far more likely that the district court's certification order will "set[] 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, 98-99 (2009). There is no reason to think this case will be one of the "vanishingly rare" exceptions to that rule. *Ibid.*

"carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari). "All that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted." *Ibid.*

III. THE DECISION BELOW IS WRONG.

The ongoing district court proceedings already bear the tell-tale signs of unmanageability.[6] Rhea's admitted inability to identify class members has prevented the district court from sending class members the notice that Rule 23 requires. See pp. 3-4 & n.2, *supra*. As a result, the class proceedings have ground to a halt while Rhea seeks additional discovery that he hopes *might* (somehow) permit him to identify class members. See Fifth Am. Scheduling Order at 2, *Rhea* v. *Apache Corp.*, No. 14-433 (E.D. Okla. Nov. 5, 2019) ECF No. 340.

---

[6] Rhea accuses Apache of "neglect[ing] to inform this Court" about the hearing the district court held on October 15, 2019. BIO 10. But because Apache filed its petition the same day the hearing was held, no such discussion was even possible.

Courts routinely decertify in circumstances like these where a class representative obtains class certification only to confront the reality that he has no idea where to begin in identifying and providing notice to the class members. See, *e.g.*, *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *O'Connor* v. *Boeing N. Am., Inc.*, 180 F.R.D. 359, 384 n.33 (C.D. Cal. 1997); *Zapata* v. *IBP, Inc.*, 167 F.R.D. 147, 165 (D. Kan. 1996). Yet, contrary to its certification-stage pledge (App.5a) to consider decertifying or redefining the class if Apache's ascertainability concerns proved well-founded, the district court has done no such thing despite the manifest unmanageability of the class and Rhea's now-admitted inability to identify class members. Indeed, it recently doubled down on its ill-fated assumption that an administratively feasible method for ascertaining the class will become apparent at some point, see Fifth Am. Scheduling Order at 2, *Rhea* v. *Apache Corp.*, No. 14-433 (E.D. Okla. Nov. 5, 2019), ECF No. 340.

Meanwhile, the already-entrenched circuit split on ascertainability has become even deeper as the effects of the Tenth Circuit's improper rejection of Apache's Rule 23(f) petition freeze the district court's rejection of the heightened standard applied by the Third, Fourth, and Eleventh Circuits in place for all venues within the Tenth Circuit. See *Dart*, 574 U.S. at 94-95

(Tenth Circuit's improper denial of permissive interlocutory appeal effectively froze "the governing rule in the [Tenth] Circuit for this case and future [ones] …"). In *Cline* v. *Sunoco, Inc. (R&M)*, No. 17-313, 2019 WL 4879187 (E.D. Okla. Oct. 3, 2019), for example, the U.S. District Court for the Eastern District of Oklahoma certified a Rule 23(b)(3) class in an order issued less than three months after the Tenth Circuit's rejection of Apache's Rule 23(f) appeal. Like Apache, Sunoco had urged the district court to require plaintiffs to demonstrate an administratively feasible method for identifying class members before permitting them to proceed as a class. Despite plaintiffs' unrebutted claim in its class-certification briefing that "[t]he Tenth Circuit has not spoken on the issue of whether 'ascertainability' is a separate requirement for class certification,"[7] the district court declared that "the Tenth Circuit does *not* require a separate ascertainability analysis" at the certification stage. *Cline*, 2019 WL 4879187, at *3.

Sunoco petitioned for permission to appeal the class-certification order under Rule 23(f). Order Denying Rule 23(f) Pet., *Cline* v. *Sunoco, Inc. (R&M)*, No. 19-608 (10th Cir. Nov. 13, 2019).

---

[7] Reply at 11, *Cline* v. *Sunoco, Inc. (R&M)*, No. 17-313 (E.D. Okla. Aug. 28, 2019), ECF No. 114.

In its briefing to the Tenth Circuit, Sunoco insisted that the proper approach to the ascertainability issue remained an open question in the Tenth Circuit despite the district court's view to the contrary. See Pet. for Permission to Appeal Class Certification at 16, *Cline*, No. 19-608 (10th Cir. Oct. 17, 2019). Rejecting Sunoco's "unresolved question of law" argument, the Tenth Circuit denied Sunoco's Rule 23(f) petition and allowed the district court's assertion that "the Tenth Circuit does *not* require a separate ascertainability analysis" to stand. See Order Denying Rule 23(f) Pet. at 2, *Cline*, No. 19-608 (10th Cir. Nov. 13, 2019).

These developments, all of which have occurred since Apache filed its petition, confirm the urgent need for immediate review from this Court. Without this Court's intervention, class-certification will continue to turn on geography. That is bad for everyone, but it is particularly harmful to parties and courts in the Second, Sixth, Seventh, Ninth, and Tenth Circuits, where more and more unascertainable classes like the one in this case sail through the certification process despite known ascertainability problems. The resulting inefficiencies, which continue to compound with no end in sight, defeat the purpose of Rule 23.

CONCLUSION

The Court should grant the petition and issue a writ of certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

TIMOTHY S. MCCONN
REAGAN W. SIMPSON
SHANE PENNINGTON
YETTER COLEMAN LLP
811 Main Street
Suite 4100
Houston, TX 77002
(713) 632-8000

MARK BANNER
HALL, ESTILL,
HARDWICK, GABLE,
GOLDEN & NELSON
320 South Boston Ave.
Suite 200
Tulsa, OK 74103-3706
(918) 594-0400

MICHAEL L. BEATTY
Counsel of Record
BEATTY & WOZNIAK
216 16th Street
Suite 1100
Denver, CO 80202
(303) 407-4499
mbeatty@bwenergylaw.com

Counsel for Petitioner