No. 17-432

IN THE
Supreme Court of the United States

CHINA AGRITECH, INC.,
Petitioner,
v.

MICHAEL H. RESH, ET AL.,
Respondents.

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

BRIEF OF THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. The question presented is:

Whether plaintiffs whose individual claims are timely as a result of *American Pipe* tolling may also bring those claims in a subsequent class action on behalf of all class members who also had timely claims under the *American Pipe* rule?

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INTEREST OF THE AMICUS

This brief is submitted on behalf of the National Conference on Public Employee Retirement Systems ("NCPERS").[1]

NCPERS is the largest national, non-profit public-pension trade association, with a membership that includes over 500 pension funds representing in excess of $3 trillion in assets providing retirement benefits to millions of American public servants. For more than half of the country's teachers and more than two-thirds of its police officers and firefighters, who are statutorily excluded from the Social Security system, these pensions provide the principal source of retirement security.[2] Since 1987, more than 60% of public pension funds' revenue has come from returns on their investments.[3] When retirement systems like those represented by the amicus are the victims of securities-law violations, the resulting loss of asset value and revenue must be made up by the sponsoring governments, and ultimately, by the taxpayers.

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[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See* 42 U.S.C. § 410(a)(7) (generally excluding State employees from coverage by Social Security, except as provided by Federal-State agreements under § 418); 42 U.S.C. § 418(d) (generally excluding State employees who are covered by State retirement systems from Federal-State agreements for Social Security coverage of State employees).

[3] *See* Nat'l Ass'n of State Ret. Administrators, *NASRA Issue Brief: Public Pension Plan Investment Return Assumptions* (updated Feb. 2018) (citing U.S. Census Bureau data), https://www.nasra.org/files/Issue%20Briefs/NASRAInvReturnAssumptBrief.pdf.

Since 1941, NCPERS has worked to protect the pensions of public employees. Because of NCPERS' interest in preserving retirement benefits for public employees, it is very concerned about fraudulent practices in the securities industry and the nation's capital markets. NCPERS recognizes the need to combat securities fraud and restrain corporate excess and appreciates the role of private securities class actions in providing a means to deter corporate wrongdoing and compensate victims of securities fraud.

NCPERS believes that the tolling of the statute of limitations by the filing of one class action should permit absent class members to file a subsequent class action after denial of class certification in the first action. This issue is important for public pension funds because under the Supreme Court's longstanding *American Pipe* tolling doctrine, they are entitled to rely on the filing of the first class action to prevent their claims from being barred by the statute of limitations, and if class certification is denied in the first action, they are then able to decide whether to file individual actions. However, in many cases, many funds' losses (and, of course, individual investors' losses) are too small to justify litigating individual actions. In those cases, it is important and just for class members to be able to aggregate their indisputably timely claims as a subsequent class action in order to achieve the economies of scale and cost-savings of a class action. To deny them this right would force class members to file duplicative class-action complaints before the running of the limitations period, imposing unnecessary burdens and expenses on the parties and the courts. If the grounds on which class certification was denied in the first action (or on which the first action was dismissed without a class-certification decision) apply to the subsequent action, class members are unlikely to file a futile subsequent action. In the

unlikely event that they do, the principles of comity and stare decisis will amply protect defendants.

SUMMARY OF ARGUMENT

I.A. Absent class members are entitled to rely on the filing of a class action to protect their rights unless and until class certification is denied. Under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), class members are specifically entitled to rely on a class action to keep their own individual claims and all class members' claims from being barred by the statute of limitations until class certification is denied. At that point, all class members are entitled to bring their individual claims before the newly running limitations period expires. But many class members' individual claims are too small to litigate separately, and permitting them to aggregate their claims in a subsequent class action is appropriate where the Rule 23 deficiency of the first action is curable.

B. Absent *American Pipe*, class members with claims too small to be litigated individually will be compelled to file duplicative class actions before the limitations period expires in order to protect their rights in case the proposed class representative in the first action fails to achieve class certification. These duplicative filings will burden the parties and the courts and are contrary to, and unnecessary under, Rule 23 and *American Pipe*.

II. In securities cases, permitting a subsequent class action to seek to cure the Rule 23 deficiencies of the first class action is consistent with the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which seeks to avoid duplicative actions by concentrating all related litigation under the control of a single court-appointed lead plaintiff. Denying *American Pipe* tolling of a subsequent class action would undermine the

PSLRA's effort to place control of securities class action in one lead plaintiff's hands at a time.

III. This Court's decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2041 (2017) ("*CalPERS*"), holding that the statute of repose under the Securities Act of 1933 is an absolute bar to any subsequently filed action, makes the "perpetual tolling" lamented by Petitioner and its amici a total fiction. The existence of some cases in which there is a short window between denial of class certification in a first action and expiration of the statute of repose, during which class members may seek to cure the first action's Rule 23 deficiency, is entirely appropriate to protect class members' rights and does not unfairly prejudice defendants, whose rights under the statute of limitations are fully protected by the filing of the first action.

IV. Congress, this Court, and scholars recognize that securities class actions play a vital role in enforcing the securities laws, compensating defrauded investors, deterring fraud, and maintaining efficient capital markets. The laments by Petitioner and its amici about supposed evils of securities class actions were all thoroughly addressed by Congress in the PSLRA.

ARGUMENT

I. CLASS MEMBERS ARE ENTITLED TO RELY ON THE FILING OF A CLASS ACTION TO PRESERVE THEIR CLAIMS AND TO AGGREGATE THEIR TIMELY CLAIMS WHERE THE FIRST ACTION'S RULE 23 DEFICIENCY IS CURABLE

The *American Pipe* rule is part of a sound structure of class and individual litigation. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). The basic princi-

ple of class litigation is that those who bring class actions act on behalf of the class, and the putative class members need not appear or participate in the action to protect their legal rights. The *American Pipe* rule fulfills that principle by eliminating the need—which is particularly pressing for institutional investors that sometimes have large stakes in the action and always have fiduciary duties to their beneficiaries—to engage in wasteful protective efforts and litigation that will all prove unnecessary if class certification is granted. Thus, *American Pipe* protects absent class members by assuring them that their claims will not be barred by the statute of limitations if class certification is denied.

But many class members' timely individual claims—including the vast majority of individual investors' claims and many institutional investors' claims—will be too small to litigate except as a subsequent class action, consistent with the purposes of Rule 23. "The very premise of class actions is that 'small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *CalPERS*, 137 S. Ct. at 2054 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)). Accordingly, applying *American Pipe* to a subsequent class action promotes Rule 23's purpose of permitting the aggregation of timely claims that are too small to litigate individually: "tolling as allowed in *American Pipe* may protect plaintiffs who anticipated their interests would be protected by a class action but later learned that a class suit could not be maintained for reasons outside their control." *Id.* at 2055.

Applying *American Pipe* to a subsequent class action also avoids the need for class members to file duplicative class-action complaints before the limitations period expires in order to protect their rights in case the

plaintiff in the first action does not achieve certification. Absent class members cannot anticipate the various reasons why the first action might not be certified, such as the plaintiff's lack of standing, the plaintiff's decision to settle or voluntarily dismiss the first action before any decision on class certification, or curable Rule 23 deficiencies. As the Court held in *Crown, Cork*, without *American Pipe* tolling of subsequent individual actions, "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations." 462 U.S. at 350-51. The exact same logic applies to a putative class member whose claim is too small to litigate individually—he or she would have every incentive to file a separate class action prior to the expiration of the limitations period in case the class was not certified in the first action for any of the various possible reasons. And "[t]he result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351. *See also CalPERS*, 137 S. Ct. at 2051 ("Without the tolling, potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable, which would breed needless duplication of motions.") (citation and quotation marks omitted); *Am. Pipe*, 414 U.S. at 551 ("To hold to the contrary would frustrate the principal function of a class suit" by encouraging "precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found 'superior to other available means for the fair and efficient adjudication of the controversy'") (quoting Rule 23(b)(3)); *id.* at 553-54 ("a rule requiring the successful anticipation of the determination of the viability of the class would breed needless duplication of motions").

Thus, applying *American Pipe* in this context promotes Rule 23's additional purpose of saving the time and resources of the putative class members, the other parties to the case, and the judicial system itself.

The prospect of multiple protective filings if China Agritech's proposed rule is adopted here is very real, as was demonstrated by the profusion of protective filings in response to the adoption, first by the Second Circuit and then by this Court, of the rule that *American Pipe* does not apply to the Securities Act's three-year statute of repose.[4] For example, in the recently settled *Petrobras* securities-fraud class action in the Second Circuit, approximately 500 institutional investors (and their managed funds and accounts) filed individual actions that are proceeding separately from the class action. *See Univs. Superannuation Scheme Ltd. v. Petróleo Brasileiro S.A.-Petrobras*, 2016 WL 3971814, Brief of Defendants-Appellants Petróleo Brasileiro S.A.-Petrobras, et al., at *6 (2d Cir. filed July 21, 2016). These institutional investors were obligated to file individual actions because the class period in the *Petrobras* case was five-and-a-half years long—January 2010 to July 2015. *See In re Petrobras Sec. Litig.*, 312 F.R.D. 354, 357 (S.D.N.Y. 2016). The class was not certified, however, until February 2016, more than six years after the start of the alleged fraud. *See id.* As a result, there was a serious risk that the three-year and five-year repose periods for claims under the Securities Act and the Securities Exchange Act of 1934, respectively, would expire before the class was certified. Indeed, some institutional investors that filed individual actions had their Securities Act and Exchange Act claims dismissed for that reason as

[4] *See CalPERS*, 137 S. Ct. 2042 (2017); *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013).

a result of the Second Circuit's intervening decision in *IndyMac*. *See In re Petrobras Sec. Litig.*, 152 F. Supp. 3d 186, 198-99 (S.D.N.Y. 2016). But hundreds of others filed timely individual actions.

The same proliferation of protective filings has occurred in other cases as well. For example, at least 27 individual actions have been filed in 2016–2018 alongside a pending securities class action against Valeant Pharmaceuticals International, Inc. in the District of New Jersey; at least 18 individual actions were filed in 2014–2015 alongside a securities class action against BP plc in the Southern District of Texas; and at least 13 individual actions were filed in 2015–2017 alongside a securities class action against American Realty Capital Properties in the Southern District of New York. In both the *Valeant* and *American Realty* cases, these protective filings were filed before a decision on class certification in the related class action.[5]

Thus, the multiplication of individual actions as a result of *American Pipe*'s inapplicability to statutes of repose has already occurred. *See also* David Freeman Engstrom & Jonah B. Gelbach, *American Pipe Tolling, Statutes of Repose, and Protective Filings: An Empirical Study*, 69 Stan. L. Rev. Online 92 (2017) (correctly predicting that this Court's adoption of the *IndyMac* rule in *CalPERS* would result in numerous protective

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[5] The *Valeant*, *BP*, and *American Realty* opt-out actions are listed in Appendix A. The *American Realty* opt-out cases were filed between January 2015 and April 2017, and the related class action was certified in August 2017. *See In re Am. Realty Capital Props., Inc.*, 2017 WL 3835881 (S.D.N.Y. Aug. 31, 2017). In *Valeant*, the district court has denied defendants' motions to dismiss in large part and denied a defendant's motion for reconsideration, and the plaintiffs have not yet moved for class certification. *See In re Valeant Pharms. Int'l, Inc., Sec. Litig.*, 2017 WL 1658822 (D.N.J. Apr. 28, 2017), *reconsideration denied*, 2017 WL 3880657 (D.N.J. Sept. 5, 2017).

filings because many class-certification decisions are delayed for years). If the Court adopts China Agritech's position here, the same logic will compel class members with losses too small to litigate individually to file protective class actions before the running of the statute of limitations. And if a subsequent class action satisfies Rule 23's requirements, it is more efficient for the parties and the courts to litigate a single class action rather than a multitude of individual actions. *See Crown, Cork*, 462 U.S. at 350-51; *Am. Pipe*, 414 U.S. at 553-54.

Importantly, the Court in *CalPERS* reaffirmed *American Pipe*'s holding that while statutes of repose do not permit equitable tolling, equitable tolling is "in accord with 'the functional operation of a statute of limitations'" because "[b]y filing a class complaint within the statutory period, the named plaintiff 'notified the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.'" *CalPERS*, 137 S. Ct. at 2051 (quoting *Am. Pipe*, 414 U.S. at 554-55).

China Agritech and its amici argue that *American Pipe* applies only to those class members who have exercised "diligence," and that the only way a class member can show diligence is to file its own individual claim. *See* Petitioner's Br. at 18-19. They say that any class members that do not file their own claims have "slept on their rights." *Id.* at 28. But this Court has held that the first class action benefits all putative class members and satisfies the burden of diligence for all class members. Thus, in *American Pipe*, the Court held that "the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue." 414 U.S. at 551. And the Court went on to hold that this result did

not depend on class members' active participation in the class suit:

> We think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit. Rule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action.

Id. at 551-52.

Moreover, the Court held that class members have no duty to take any action regarding their claims until class certification is denied:

> Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.

Id. at 552. Likewise, the Court held in *Crown, Cork* that "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." 462 U.S. at 352-53.

Thus, a class action is a true representative action, and someone who is a putative class member has not slept on her rights by not filing her own action before

class certification is denied or the complaint is dismissed in the first class action, because she is entitled to benefit from the first action. Public pension funds and other institutional investors, as well as individual investors, have relied for decades on *American Pipe* tolling in this way. To make tolling of the statute of limitations unavailable to class members whose claims are too small to litigate individually would be contrary to this Court's precedents and to Rule 23. China Agritech's whole theory is at odds with how class actions operate, as explained in *American Pipe* and *Crown, Cork*.

II. PERMITTING SUBSEQUENT CLASS ACTIONS IS CONSISTENT WITH THE PSLRA

According to China Agritech and its amici, even though their proposed rule incentivizes duplicative class actions, this is acceptable because a single duplicative class action would preserve absent class members' rights without any need for tolling. *See* Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioner, at 15-16. This argument fails, because other class members are no better able to assess the adequacy of any duplicative filer than they are to assess the court-appointed lead plaintiff's adequacy. Thus, any class member that is concerned about preserving its right to aggregate its claims in a class action if other proposed representatives are rejected by the court has a strong incentive to file its own class-action complaint before the limitations period expires. This incentive for duplicative filings is contrary to Rule 23 and *American Pipe*.

In addition to improperly incentivizing duplicative actions, Petitioner and its amici's argument gets the PSLRA backward. The whole point of the PSLRA's lead-plaintiff process is to centralize all efforts into a single class action led by a single lead plaintiff (or a

small, cohesive lead-plaintiff group) as soon as possible, precisely to prevent duplicative class efforts. *See Hevesi v. Citigroup Inc.*, 366 F.3d 70, 82-83 & n.13 (2d Cir. 2004). Thus, the statute directs courts first to consider any motion to consolidate similar class actions before considering motions for appointment as lead plaintiff. *See* 15 U.S.C. §§ 77z-1(a)(3)(B)(ii), 78u-4(a)(3)(B)(ii).

Also, because the PSLRA directs the court to presumptively pick the plaintiff with the largest financial interest as the most adequate, *see* 15 U.S.C. §§ 77z-1(a)(3)(B)(iii)(I), 78u-4(a)(3)(B)(iii)(I), there is little reason for a small investor to try for lead-plaintiff status knowing that larger investors are likely to seek appointment as lead plaintiff.

Furthermore, the PSLRA gives control of the litigation to the court-appointed lead plaintiff, leaving absent class members and even named plaintiffs and proposed class representatives other than the lead plaintiff under the lead plaintiff's control. *See Hevesi*, 366 F.3d at 82-83 & n.13. For all of these reasons, Petitioner and its amici are wrong in asserting that incentivizing duplicative filings before the limitations period runs is consistent with the PSLRA.

China Agritech and its amici also argue that permitting a subsequent class action after denial of class certification in the first action would make it too difficult to settle class actions because of the possibility of a later class action, but this makes no sense. The court-appointed lead plaintiff in the first action has the authority to settle the action on behalf of the entire class, subject to court approval, and any settlement invariably—at defendants' understandable insistence—includes a broad release of all claims that were or could have been asserted in the case. Defendants invariably insist on global peace in exchange for a settlement. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Epstein,* 516

U.S. 367, 382 (1996) (holding that settlement may release claims based on same facts and different legal theory); *In re WorldCom, Inc. Sec. Litig.*, 2004 WL 2591402, at *12-13 (S.D.N.Y. Nov. 12, 2004) (approving settlement that released all claims class members could have brought against defendants relating to WorldCom securities and overruling objection to breadth of release). Thus, the only avenue for class members to challenge a settlement negotiated by the court-appointed lead plaintiff in the first class action is to object to court approval of the settlement (and to appeal if the court grants approval). Any subsequent class action asserting claims that were or could have been asserted in the first class action will be barred by the court-approved release in the settlement of the first action.

III. THERE IS NO POSSIBILITY OF "PERPETUAL TOLLING" IN SECURITIES CLASS ACTIONS

In securities litigation, the concern about endless class actions is nonexistent because *CalPERS* now makes the statute of repose an absolute outer limit. Thus, the repeated invocation by China Agritech and its amici of the supposed evil of "perpetual tolling" is a straw man. *See* Petitioner's Br. at 43, 46-47; Sec. Indus. & Fin. Mkts. Ass'n Br. at 2, 6, 9, 20. This Court held in *CalPERS* that the three-year statute of repose applicable to claims under Sections 11 and 12 of the Securities Act is an absolute bar, *see* 137 S. Ct. at 2055, and lower courts have held that *CalPERS* also governs the five-year statute of repose applicable to claims under Section 10(b) of the Exchange Act and Securities and Exchange Commission Rule 10b-5, *see N. Sound Capital LLC v. Merck & Co.*, 702 F. App'x 75, 77, 81 (3d Cir. 2017) (unpublished opinion).

It is true, of course, that class certification is denied in some securities actions when the one-year statute of limitations under the Securities Act or the two-year statute of limitations under the Exchange Act has run, but the applicable statute of repose has not. And this is the category of cases for which the Court's decision in this case will matter. But China Agritech and its amici are wrong to assert that there is something improper about the existence of some cases in which subsequent class actions would be possible during the narrow window between the denial of certification in the first action and the running of the repose period. This is precisely the category of cases in which it is entirely proper for class members with claims too small to litigate individually to have an opportunity to cure the Rule 23 deficiencies of the first action.

IV. CONGRESS AND THIS COURT HAVE RECOGNIZED THAT SECURITIES CLASS ACTIONS CONTRIBUTE TO STRONGER MARKETS

Rather than confronting the injustice and practical problems inherent in preventing absent class members with indisputably timely individual claims from proceeding on a class basis when their individual claims are too small to litigate individually and the Rule 23 problems in the prior action are curable, China Agritech and its amici devote much of their briefing to the purported evils of securities litigation and the supposed need to protect corporations from "extortionate" settlements. *See* Washington Legal Foundation Br. at 9, 23-28.

The most obvious response is that Congress disagrees. Faced with precisely these arguments in 1995, Congress passed the PSLRA, which instituted several measures to curb abusive lawsuits and reduce undue pressures to settle. In addition to imposing heightened

pleading standards and staying discovery until the complaint has survived motions to dismiss, the PSLRA also limits defendants' joint and several liability, thus significantly reducing their exposure to damages. *See* 15 U.S.C. § 78u-4(f). It also requires plaintiffs to prove loss causation, so that defendants will not be liable for price declines unrelated to the fraud, and limits damages in cases where the market quickly rebounds after a negative disclosure. *See* 15 U.S.C. §§ 78u-4(b)(4), 78u-4(e). It also provides special protections for "forward-looking statements." 15 U.S.C. § 78u-5. And, to strengthen the role of institutional investors, it added new procedures for selecting lead plaintiffs. *See* 15 U.S.C. § 78u-4(a)(3). These provisions have succeeded both in increasing the number of weak cases that are dismissed, as discussed below, and in increasing recoveries for investors in meritorious cases that survive the PSLRA's new hurdles.[6]

Thus, if China Agritech and its amici believe that, despite the PSLRA, investor plaintiffs still hold too much power over corporate defendants, their complaints are better directed to Congress.

This Court has also repeatedly recognized that securities class actions play a vital role in enforcing the securities laws. In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), the Court noted that "the

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[6] The rate of institutional participation as lead plaintiffs has increased since the PSLRA was passed, and institutional plaintiffs are associated with larger recoveries for class members and lower attorneys' fees. *See* NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review* 39 (2018); NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2011 Year-End Review* 19 (2011); C. S. Agnes Cheng, et al., *Institutional Monitoring Through Shareholder Litigation*, 95 J. Fin. Econ. 356, 358-60 (2010); Jill E. Fisch, *The Overstated Promise of Corporate Governance*, 77 U. Chi. L. Rev. 923, 938 (2010).

availability of private securities fraud actions" is important for "maintain[ing] public confidence in the marketplace . . . by deterring fraud . . . ." *Id.* at 345 (citing *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986)). Similarly, in *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), the Court held that requiring securities-fraud plaintiffs to prove direct reliance on defendants' misrepresentations, as in common-law fraud cases, would prevent class actions and block a path for recovery from fraud that helps to ensure public trust in the financial markets. *See id.* at 2185. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), this Court reaffirmed its "conclusion 'that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *Id.* at 320 n.4 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006)). Indeed, "the effectiveness of the securities laws" depends "in large measure on the application of the class action device." *Yang v. Odom*, 392 F.3d 97, 109 (3d Cir. 2004) (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985)).[7]

More fundamentally, the notion of class certification being used to coerce defendants into settling frivolous

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[7] Professors Hillary A. Sale and Robert B. Thompson conclude that *Dura*, *Amgen*, and the two *Halliburton* decisions "reaffirm the foundation of *Basic* that class actions are a core part of securities regulation and, importantly, Basic's conclusion that adaptations to the common law of reliance through market intermediation and the fraud-on-the-market presumption are necessary if class actions are to have the effective deterrence role the Court supports." Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, Georgetown Law Faculty Publications and Other Works No. 1526, at 18 (2015), http://scholarship.law.georgetown.edu/facpub/1526.

claims has been thoroughly debunked. This Court rejected this notion in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), holding that Congress adequately addressed any such concern that existed before 1995 when it adopted the PSLRA. *See id.* at 1202. Scholars have also rejected this notion. *See, e.g.*, Sale & Thompson, *supra*, at 15; Joel Seligman, *The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*," 108 Harv. L. Rev. 438, 448-455 (1994); Geoffrey Miller, *Access to Justice: Investor Suits in the Era of the Roberts Court: A Modest Proposal for Securities Fraud Pleading after Tellabs*, 75 Law & Contemp. Probs. 93, 99 (2012). A 1996 study for the Advisory Committee on Civil Rules concluded that "there were *no* objective indications that settlement was coerced by class certification," and that attempted strike suits were adequately addressed via dismissals on the pleadings or at summary judgment, *without* settlement. Thomas E. Willging, et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 90 (Federal Judicial Center 1996) (emphasis added).[8]

In any event, whatever concerns one might have had about frivolous securities litigation in the past, these

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[8] *See also* James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 Ariz. L. Rev. 497, 503-04 (1997); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2080-84 (1995); Leonard B. Simon & William S. Dato, *Legislating on a False Foundation: The Erroneous Academic Underpinnings of the Private Securities Litigation Reform Act of 1995*, 33 San Diego L. Rev. 959, 990-93 (1996).

have been addressed by the PSLRA. Since then, securities claims have been dismissed at much higher rates, and those rates climb year after year. *See* NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review* 23 (2018) (reporting that about a third of cases filed in 2000–2002 were dismissed and more than half of cases filed in 2009–2011, the most recent years with substantial resolution data, were dismissed);[9] Michael Klausner, Jason Heglund & Matthew Goforth, *When Are Securities Class Actions Dismissed, When Do They Settle, and for How Much?—An Update* 1, 3 (PLUS Journal, Apr. 2013; Stanford Law and Economics Olin Working Paper No. 445; Rock Center for Corporate Governance at Stanford University Working Paper No. 145), http://ssrn.com/abstract=2260831 (finding that almost 40% of securities class actions filed between 2006 and 2010 were dismissed on the pleadings); Stephen J. Choi, et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. Empirical Legal Stud. 35, 48 (2009) (comparing dismissal rates pre- and post-PSLRA); Christine Hurt, *The Undercivilization of Corporate Law*, 33 Iowa J. Corp. L. 361, 389 (2008) (same). As the Fifth Circuit put it, with retired Justice O'Connor sitting by designation, "to be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) (per curiam).[10]

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[9] These figures include claims filed under Section 11 of the Securities Act, which does not have scienter, loss-causation, or reliance requirements. The rate of dismissal for Section 10(b) claims is likely much higher.

[10] *See also* Hurt, *supra*, at 387, 402 ("the pleading and evidentiary burden on plaintiffs in [securities fraud] civil cases is quite high, and a large number of cases are dismissed prior to discovery

Notably, the district court here denied China Agritech's motions to dismiss the *Dean* and *Smyth* cases. Thus, there is no dispute that the investor plaintiffs here satisfied the PSLRA's stringent pleading requirements, and permitting a subsequent class action would not be opening the door to a strike suit.

There is every reason to believe that the PSLRA's heightened pleading standards will continue to be enforced, as the increasing dismissal rates identified in NERA's 2017 Report confirm. NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review* 23 (2018) ("the rate of case dismissal has steadily increased").

At the same time, scholars have documented how securities class action litigation improves corporate governance. Class action lawsuits deter aggressive financial reporting both at the targeted firm and—more interestingly—even at peer firms in the same industry. *See* Jared N. Jennings, Simi Kedia, & Shivaram Rajgopal, *The Deterrent Effects of SEC Enforcement and Class Action Litigation* (December 2011), http://ssrn.com/abstract=1868578. One study found that "these lawsuits appear to change firm behavior towards better governance, greater focus, and lower overinvestment." Brian Carson McTier & John K. Wald, *The Causes and Consequences of Securities Class Action Litigation*, 17 J. Corp. Fin. 649, 663 (2011), while another concluded that "institutional investors' involvement in securities litigation enhances . . . the quality of the defendant firms' corporate governance. In light of the ineffectiveness of tra-

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at the pleading stage . . . . To increase the level of specificity that plaintiffs must know and plead but to block the same plaintiffs from any information-producing discovery creates a catch-22 situation that few can surmount . . . .").

ditional institutional monitoring channels (e.g., private communication and filing proposals, etc.) and the increasing number of securities litigations, institutional investors could use litigation as a mechanism to discipline management and to secure the long-term health of the firms." Cheng, *supra*, at 381; *see also* Geraldine Szott Moohr, *The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement*, 46 Am. Crim. L. Rev. 1459, 1470 (2009) ("Studies show that private civil suits may also be more effective in regulating financial markets than public enforcement . . . .").

Private securities fraud class actions also serve as a necessary complement to public enforcement by the SEC. The SEC relies on ex post enforcement actions—both private and public—to regulate the markets, rather than directly regulating business transactions themselves ex ante. *See* Samuel Issacharoff, *Regulating After the Fact*, 56 Depaul L. Rev. 375, 379 (2007). An ex post model is particularly suited to private enforcement, *see id.* at 381-82, and—compared to countries that use ex ante regulation—contributes to freer, better developed markets, *see id.* at 376-77, 385. Given that "'[t]he resources of the [SEC] are adequate to prosecute only the most flagrant abuses,' private litigation mechanisms . . . may often be needed to prevent a noninsignificant amount of misconduct from escaping regulation." J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1159-60 (2012) (quotation marks omitted).

More broadly, by deterring fraud and promoting investor confidence in American capital markets, securities class actions contribute to our nation's economic health:

> [C]lass actions . . . function as a necessary and effective deterrent of misconduct that adversely affects the market as a whole.
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> ***
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> Securities fraud, if unchecked, creates a market in which no one, not offerors, buyers, or sellers, wants to participate. Simply put, fairness, and the belief in it, matters to market participants and, thus, to growth and innovation.
>
> ***
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> Class actions . . . play an important role in policing and protecting the market and ensuring its strength. The market works to allocate capital from investors to users. Issuers rely on the market, and indirectly, its efficiency and intermediation, to access capital. Capital allocation, in turn, supports growth and innovation, but only when belief in the market's fairness is sustained.
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> Viewed through the publicness lens, then, class actions play not just a direct, investor protection role, they also play a larger role in policing and supporting the market, which in turn fuels growth and innovation.

Sale & Thompson, *supra*, at 43-44.

Securities class actions, subject to the limitations already placed by the PSLRA, thus continue to play a critical role in the enforcement of the securities laws and investor protection, including the protection of American public servants' retirement security.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Appendix A

Valeant Pharmaceuticals International, Inc. Opt-Out Cases
T. Rowe Price Growth Stock Fund, Inc. et al. v. Valeant Pharm. Int'l Inc., et al., No. 3:16-cv-05034 (D.N.J.)
Equity Trustees Ltd. ex rel. A T. Rowe Price Global Equity Fund, et al. v. Valeant Pharm. Int'l, Inc., et al., No. 3:16-cv-06127 (D.N.J.)
Principal Funds, Inc., et al. v. Valeant Pharm. Int'l, Inc., et al., No. 3:16-cv-06128 (D.N.J.)
BloombergSen Partners Fund LP et al. v. Valeant Pharm. Int'l, Inc., et al., No. 3:16-cv-07212 (D.N.J.)
Pentwater Equity Opportunities Master Fund Ltd., et al v. Valeant Pharm. Int'l, Inc. et al., No. 3:17-cv-07552 (D.N.J.)
Discovery Global Citizens Master Fund, Ltd., et al. v. Valeant Pharm. Int'l, Inc., et al., No. 3:16-cv-07321 (D.N.J.)
MSD Torchlight Partners, L.P. et al. v. Valeant Pharm. Int'l, Inc., No. 3:16-cv-07324 (D.N.J.)
Bluemountain Foinaven Master Fund L.P. et al. v. Valeant Pharm. Int'l Inc., No. 3:16-cv-07328 (D.N.J.)
Incline Global Master LP, et al. v. Valeant Pharm. Int'l, Inc., No. 3:16-cv-07494 (D.N.J.)

Valeant Pharmaceuticals International, Inc. Opt-Out Cases
Valic Co. I, et al. v. Valeant Pharm. Int'l, Inc., No. 3:16-cv-07496 (D.N.J.)
Janus Aspen Series, et al. v. Valeant Pharm. Int'l, Inc., et al., No. 3:16-cv-07497 (D.N.J.)
Lord Abbett Inv. Trust-Lord Abbett Short Duration Income Fund et al. v. Valeant Pharm. Int'l Inc., et al., No. 3:17-cv-06365 (D.N.J.)
Okumus Opportunistic Value Fund, Ltd. v. Valeant Pharm. Int'l Inc., et al., No. 3:17-cv-06513 (D.N.J.)
Pub. Emps. Ret. Sys. of Miss. v. Valeant Pharm Int'l, Inc., et al., No. 3:17-cv-07625 (D.N.J.)
Boeing Co. Emp. Ret. Plans Master Trust, et al v. Valeant Pharm. Int'l, Inc. et al., No. 3:17-cv-07636 (D.N.J.)
Första AP-Fonden, et al. v. Valeant Pharm. Int'l, Inc., et al., No. 3:17-cv-12088 (D.N.J.)
State Bd. of Admin. of Florida v. Valeant Pharm. Int'l, Inc., et al., No. 3:17-cv-12808 (D.N.J.)
Regents of Univ. of Cal. v. Valeant Pharm. Int'l, Inc., et al., No. 3:17-cv-13488 (D.N.J.)

Valeant Pharmaceuticals International, Inc. Opt-Out Cases
GMO Trust, et al. v. Valeant Pharm. Int'l, Inc., No. 3:18-cv-00089 (D.N.J.)
BlackRock Global Allocation Fund, Inc., et al. v. Valeant Pharm. Int'l, Inc., et al., No. 3:18-cv-00343 (D.N.J.)
Colonial First State Investments Ltd. ex rel. Commonwealth Global Shares Fund 1, et al. v. Valeant Pharm. Int'l, Inc., No. 3:18-cv-00383 (D.N.J.)
Ahuja, et al. v. Valeant Pharm. Int'l, Inc., et al., No. 3:18-cv-00846 (D.N.J.)
Brahman Partners II, L.P., et al. v. Valeant Pharm. Int'l, Inc., et al., No. 3:18-cv-00893 (D.N.J.)
Prudential Ins. Co. of Am., et al. v. Valeant Pharm. Int'l, Inc., et al., No. 3:18-cv-01223 (D.N.J.)
New York City Emps.' Ret. Sys. v. Valeant Pharm. Int'l, Inc., et al., No. 3:18-cv-00032 (D.N.J.)
Hound Partners Offshore Fund, LP v. Valeant Pharm. Int'l, Inc., et al., No. 1:18-cv-00076 (S.D.N.Y.)

BP plc Opt-Out Cases
Arkansas Teacher Ret. Sys., et al. v. BP, No. 14-cv-00457 (S.D. Tex.)
BP Litig. Recovery I, L.L.C. v. BP, No. 15-cv-01061 (S.D. Tex.)
BPLR, L.L.C. v. BP, No. 15-cv-01059 (S.D. Tex.)
Deka Investment GmbH, et al. v. BP, No. 14-cv-01073 (S.D. Tex.)
DiNapoli, et al. v. BP, No. 14-cv-01083 (S.D. Tex.)
GIC Private Limited, et al. v. BP, No. 14-cv-01072 (S.D. Tex.)
Helaba Invest, et al. v. BP, No. 14-cv-01065 (S.D. Tex.)
IBM United Kingdom Pensions Trust Ltd. v. BP, No. 14-cv-01279 (S.D. Tex.)
Illinois State Bd. of Investment v. BP, No. 14-cv-01075 (S.D. Tex.)
John Hancock Capital Series, et al. v. BP, No. 15-cv-02704 (S.D. Tex.)
Kaynes v. BP, No. 15-cv-00809 (S.D. Tex.)
Maryland State Ret. & PensionSystem, et al. v. BP, No. 14-cv-01068 (S.D. Tex.)

BP plc Opt-Out Cases
Merseyside Pension Fund v. BP, No. 14-cv-01281 (S.D. Tex.)
PEAK 6 Capital Management LLC, et al. v. BP, No. 15-cv-00865 (S.D. Tex.)
Pension Reserves Inv. Mgmt. Bd. of Mass., et al. v. BP, No. 14-cv-01084 (S.D. Tex.)
Bank of Am.Pension Fund, et al. v. BP, No. 14-cv-01418 (S.D. Tex.)
Universities Superannuation Scheme Ltd. v. BP, No. 14-cv-01280 (S.D. Tex.)
Virginia Ret. Sys., et al. v. BP, No. 14-cv-01085 (S.D. Tex.)

American Realty Capital Properties Opt-Out Cases
Twin Securities, Inc., et al. v. American Realty Capital Properties, No. 15-cv-1291 (S.D.N.Y.)
HG Vora Special Opportunities Master Fund v. American Realty Capital Properties, No. 15-cv-04107 (S.D.N.Y.)
Blackrock v. American Realty Capital Properties, No. 15-cv-08464 (S.D.N.Y.)

American Realty Capital Properties Opt-Out Cases
PIMCO Funds v. American Realty Capital Properties, No. 15-cv-08466 (S.D.N.Y.)
Clearline Capital Partners LP, et al. v. American Realty Capital Properties, No. 15-cv-08467 (S.D.N.Y.)
Pentwater Equity Opportunities Master Fund Ltd. v. American Realty Capital Properties, No. 15-cv-08510 (S.D.N.Y.)
Eton Park Fund, L.P. v. American Realty Capital Properties, No. 16-cv-09393 (S.D.N.Y.)
Reliance Standard Life Insurance Co., v. American Realty Capital Properties, No. 17-cv-02796 (S.D.N.Y.)
Jet Capital Master Fund, L.P. v. American Realty Capital Properties, No. 15-cv-00307 (S.D.N.Y.)
Archer Capital Master Fund, L.P. v. American Realty Capital Properties, No. 16-cv-05471 (S.D.N.Y.)
Atlas Master Fund, Ltd. v. American Realty Capital Properties, No. 16-cv-05475 (S.D.N.Y.)
Fir Tree Capital Opportunity Master Fund, L.P. v. American Realty Capital Properties, No. 17-cv-04975 (S.D.N.Y.)
Vanguard Specialized Funds, et al. v. VEREIT Inc., et al., No. 15-cv-2157 (D. Ariz.)