17-432

No. 17-__

IN THE

Supreme Court of the United States

CHINA AGRITECH, INC.,
Petitioner,
v.
MICHAEL RESH, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court held that the "timely filing of a defective class action toll[s] the limitations period *as to the individual claims* of purported class members." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990) (emphasis added). In this case, two defective class actions were filed during the limitations period. Respondents, absent members of the rejected classes, filed a third class action, this time outside the limitations period. The Ninth Circuit construed *American Pipe* to toll the limitations period and make this third class action timely. Respondents' class complaint would have been dismissed as untimely in at least six other Circuits, which have held—as this Court recognized in *Irwin* and other cases—that *American Pipe* applies only to individual actions, not new class actions brought by previously absent class members.

The question presented is:

Whether the *American Pipe* rule tolls statutes of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period.

PARTIES TO THE PROCEEDING

Petitioner, a defendant below, is China Agritech, Inc.

The other defendants in the court below—and "respondents by rule" here—are Yu Chang, Yau-Sing Tang, Gene Michael Bennett, Xiao Rong Teng, Ming Fang Zhu, Lun Zhang Dai, Hai Lin Zhang, Charles Law, and Zheng Anne Wang. Of these individual defendants, only Charles Law has been served.

Respondents, plaintiffs below, are Michael Resh, William Schoenke, Heroca Holding, B.V., and Ninella Beheer, B.V.

RULE 29.6 DISCLOSURE

China Agritech, Inc. has no parent corporation. Carlyle Asia Growth Partners IV, L.P. and CAGP IV Co-Investment, L.P., investment funds affiliated with The Carlyle Group, collectively own more than 10% of the stock of China Agritech, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 857 F.3d 994 and reprinted in the Appendix to the Petition ("App.") at 1a–23a. The district court's opinion granting petitioner's motion to dismiss is unpublished but reported at 2014 WL 12599849 and is reprinted at App. 24a–37a. The district court's opinion denying respondents' motion for reconsideration is unpublished but reported at 2015 WL 12781246 and is reprinted at App. 38a–44a.

JURISDICTION

The court of appeals issued its decision on May 24, 2017. App. 1a. The court denied rehearing on July 3, 2017. App. 45a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1658(b) provides, in relevant part: "[A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than the earlier of . . . (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."

INTRODUCTION

This Court's precedents have long held that statutes of limitations are equitably tolled during the pendency of a putative class action to allow absent class members to later bring their own otherwise untimely claims. *See Am. Pipe and Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). This tolling rule protects absent class members' reliance on the class mechanism and discourages duplicative lawsuits.

For decades, the courts of appeals have uniformly rejected plaintiffs' attempts to extend *American Pipe* tolling to permit absent class members to bring not only their own claims, but also to bring claims on behalf of a class. The First, Second, Third, Fifth, Eighth, and Eleventh Circuits have held that the principles underlying *American Pipe* tolling for *individual* actions—i.e., preventing absent class members from having to file protective individual claims for fear of having them dismissed as untimely—have no application to serial *class* actions, particularly when a court had already rejected an attempt to certify a materially identical class. Tolling in those circumstances, these courts have explained, would not further any purpose recognized in *American Pipe.* Instead it would allow plaintiffs to engage in repeated attempts to certify class actions and thus undermine both the principles of *American Pipe* and the purpose of statutes of limitations.

In recent years, however, three courts of appeals—including the Ninth Circuit in the decision below—have rejected that conclusion and interpreted *American Pipe* to toll the limitations period to al-

low formerly absent class members not only to pursue their own claims but the claims of a putative class. The Ninth Circuit joined the Sixth and Seventh Circuits in adopting a rule that would extend the statute of limitations for class actions indefinitely, casting aside Congress's effort to cut off stale claims through clear time bars and inviting facially abusive litigation without any appreciable benefit to anyone other than the plaintiffs' bar.

This Court should grant certiorari to resolve the conflict among the courts of appeals over this important and recurring question. This six-to-three conflict will lead to obvious forum shopping opportunities, since the viability of an untimely class action will depend on the jurisdiction in which it was filed. After all, many nationwide class actions can be brought in any circuit, so plaintiffs seeking to lead untimely follow-on class actions will choose a circuit that permits stale class actions.

The question presented is also outcome-determinative in this case. There is no dispute that this class action is time-barred without the benefit of *American Pipe* tolling. It is the third of three materially identical class actions; the first two were timely filed but certification was denied. Respondents were absent members of the first two proposed classes and filed this putative class action outside the limitations period. It was allowed to proceed only because the Ninth Circuit held that *American Pipe* tolls the limitations period to allow previously absent class members to file new class actions. The class complaint would have been rejected as untimely had it been filed in most other circuits.

In short, this petition presents an important, recurring, and outcome-determinative question that divides the courts of appeals. And the Ninth Circuit answered that question incorrectly. Certiorari should be granted and the decision below reversed.

STATEMENT OF THE CASE

A. Relevant Legal Background

1. This is the third identical class action brought on behalf of shareholders of petitioner China Agritech, Inc. ("China Ag") alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934. App. 8a. Congress has mandated that securities fraud actions like this one be brought within "2 years after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b). It is undisputed that the publicly available facts that respondents say constitute the alleged Exchange Act violations here were known and discovered more than two years before this complaint was filed. App. 9a. Thus, a straightforward application of the § 1658(b) two-year time bar would require dismissal of this action as untimely. *Id.*

2. Statutes of limitations reflect Congress's "value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Del. State Coll. v. Ricks*, 449 U.S. 250, 260 (1980). Such time bars are as a general matter strictly enforced. *See, e.g.*, *Gabelli v. SEC*, 568 U.S. 442, 448 (2013).

This Court has also recognized, however, that statutes of limitations may be subject to equitable

tolling in "extraordinary circumstances." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016). Relevant here is the equitable tolling rule first recognized in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974).

"[T]he source of the tolling rule applied in *American Pipe* is the judicial power to promote equity." *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017). A limitations period is tolled during the pendency of a putative class action, the *American Pipe* Court explained, to allow absent class members to bring their own individual claims. *See* 414 U.S. at 553. The specific question in *American Pipe* was whether absent class members of an uncertified class could intervene as plaintiffs in the subsequent individual suits of the named plaintiffs, even if the statute of limitations would otherwise bar the intervention. To protect absent class members' reliance on the class mechanism and discourage duplicative lawsuits, the Court held that "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.*; *see also id.* (Absent tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable.").

In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court extended the *American Pipe* rule to individual standalone claims. The Court reiterated that if statutory time limits for individual

claims were not tolled, the "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. The Court therefore concluded that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Id.* at 354. "At that point," the Court explained, "class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.*

3. This Court's precedents accordingly recognize that "plaintiff's timely filing of a defective class action toll[s] the limitations period *as to the individual claims* of purported class members." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990) (emphasis added). The question presented here is whether the *American Pipe* rule should be expanded to also toll statutes of limitations to allow previously absent class members to bring *class* actions outside the applicable limitations period.

B. Factual And Procedural Background

1. *Prior Class Actions*

a. The first proposed class action alleging that China Ag violated the Exchange Act was filed by Theodore Dean in February 2011. Dean wanted to represent a class of China Ag shareholders in suing China Ag and several managers and directors for allegedly violating §§ 10(b) and 20(a) of the Exchange Act, and § 11 of the Securities Act of 1933. App. 4a–6a. In October 2011, Judge Klausner—the same district judge as in this case—dismissed the Securities

Act claim on the pleadings but allowed the Exchange Act claims to proceed. App. 6a.

Dean and several newly added named plaintiffs then moved to certify a class. Respondents were not among the new named plaintiffs and did not seek to serve as lead plaintiffs or otherwise appear in the case. In March 2011, the district court denied class certification on the ground that the proposed class failed to satisfy Rule 23(b)(3)'s predominance requirement. App. 6a. Specifically, the district court concluded that the *Dean* plaintiffs had failed to satisfy the preconditions for a fraud-on-the-market theory of reliance and thus individual questions of reliance predominated over common ones. *Id.* The *Dean* plaintiffs appealed the class certification decision under Rule 23(f), and the court of appeals affirmed. *Id.*

The *Dean* plaintiffs subsequently settled their individual claims in September 2012. *Id.*

b. Approximately three weeks later, Kevin Smyth filed what the court of appeals characterized as "an almost identical class-action complaint on behalf of the same would-be class against China Agritech." App. 7a. The *Smyth* action was filed one year and eight months after plaintiffs' claims accrued. *Id.* Again, respondents did not seek to participate as named plaintiffs or appear in this action.

Although originally filed in the District of Delaware, the action was transferred to Judge Klausner. App. 7a. In August 2013, the *Smyth* plaintiffs moved for class certification, and the district court again denied the motion, this time for failure to sat-

isfy the typicality and adequate representation requirements of Rule 23(a)(3) and (a)(4). App. 7a–8a.

In January 2014, the *Smyth* plaintiffs dismissed their claims without prejudice. App. 8a.

2. *This Class Action*

It is undisputed that class members were given notice and an opportunity to intervene under the special notice requirements of the Private Securities Litigation Reform Act (the "PSLRA"). *See* 15 U.S.C. § 78u-4(a)(3). For more than three years, however, respondents chose not to get involved. Instead they waited until class certification in the *Dean* and *Smyth* actions was denied and only then sought to certify exactly the same class before the same district court that had already twice found class treatment inappropriate. App. 8a.

Respondents finally filed this case in June 2014—17 months after the applicable two-year statute of limitations had lapsed under 28 U.S.C. § 1658(b)(1). App. 8a–9a. Respondents alleged violations of Exchange Act §§ 10(b) and 20(a) "based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions." App. 8a. The case was again assigned to Judge Klausner. No other plaintiffs filed suit (either an individual or class action), sought to be appointed as lead plaintiffs, or otherwise showed an interest in this case.

3. *District Court Decision*

The district court rejected the class claims as time-barred. Relying on Ninth Circuit precedent,

the district court held that *American Pipe* tolling permitted respondents to bring their individual claims, but not another class action. The district court thus dismissed the class complaint, but permitted respondents to pursue individual actions. App. 29a–36a; *see also* App. 41a–44a.

4. *Court of Appeals Decision*

a. Respondents declined to pursue their individual claims, even though they claimed damages of nearly half a million dollars. They instead appealed, and a panel of the Ninth Circuit reversed. Departing from its own precedent, the panel held that *American Pipe* tolling permits absent class members to bring not only their own claims after the statute of limitation lapses, but also claims on behalf of absent class members—even when the district court previously found the identical class deficient. App. 22a.

The court of appeals acknowledged that an earlier Ninth Circuit panel had followed the Second Circuit in holding that "'extend[ing] tolling to class actions "tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options."'" App. 14a (quoting *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987), in turn quoting *Korwek v. Hunt*, 827 F.2d 874, 879 (2d. Cir. 1987)). But the court also construed its later *en banc* opinion in *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000), as rejecting that position. The court of appeals instead held that, in the Ninth Circuit, *American Pipe* tolls the limitations period for otherwise untimely class actions and the only limits on sequential class

actions are preclusion and comity principles. App. 15a–17a.

The court of appeals concluded that this view was consistent with three of this Court's recent cases, App. 17a–21a—two of which did not mention tolling at all, *see Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), and one of which characterized *American Pipe* tolling as applicable only to individual claims, *see Smith v. Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011). The court of appeals also acknowledged *Smith*'s holding that preclusion does not apply to absent members of an uncertified class, *id.* at 315; *see* App. 18a, so preclusion principles cannot prevent perpetual class actions.

The court of appeals recognized that its rule could invite abusive litigation in the form of never-ending class actions, but identified three supposed safeguards against such abuse. First, the panel said that self-restraint by the plaintiffs' bar would serve to limit class litigation abuse. App. 22a. Second, the court held that preclusion principles would provide some barrier to serial litigation, despite acknowledging that preclusion does not apply to new class actions brought by previously absent class members (such as respondents). *Id.* Third, the panel explained that district courts could reject improper attempts to stack class actions by invoking "comity" to prior decisions denying class certification. *Id.*

b. The court of appeals denied rehearing and rehearing *en banc*. App. 46a. This petition followed.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to consider whether *American Pipe* tolling extends beyond individual actions by absent class members and allows those absent members to bring new class actions beyond the applicable limitations period. The courts of appeals are divided over that important and recurring question, and this case is an ideal vehicle through which to resolve it. And the court of appeals decided the question incorrectly.

The petition should be granted, and the decision below reversed.

A. The Courts of Appeals Are Irreconcilably Divided over Whether *American Pipe* Tolling Extends to Otherwise Untimely Class Actions.

1. *The First, Second, Fifth, and Eleventh Circuits Reject* American Pipe *Tolling for Class Actions.*

Four Circuits have definitively rejected the Ninth Circuit's position in this case that *American Pipe* tolling extends to otherwise untimely class actions, instead concluding that *American Pipe* applies only to *individual* claims of absent class members.

a. The First Circuit rejected extending *American Pipe* tolling to class actions in *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998). The court held that the "policies—respect for Rule 23 and considerations of judicial economy—which animated the *Crown, Cork* and *American Pipe* tolling rules dictate that the tolling rules . . . not permit plaintiffs to

stretch out limitations periods by bringing successive class actions." *Id.* at 11. "Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely," the court explained, because "[p]ermitting such tactics would allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how many times a court declines to certify the class." *Id.* "This simply cannot be what the *American Pipe* rule was intended to allow," the First Circuit concluded, "and we decline to embrace such an extension of that rule." *Id.*

b. As the court below recognized, App. 14a, the Second Circuit has also held that *American Pipe* tolling "was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification," because "such an application of the rule would be inimical to the purposes behind statutes of limitations and the class action procedure." *Korwek*, 827 F.2d at 879.

The Second Circuit also explained that this Court's precedents "represent a careful balancing of the interests of plaintiffs, defendants, and the court system." *Id.* The case before the court fell "beyond [those] carefully crafted parameters into the range of abusive options" because the plaintiffs had "filed a complaint alleging class claims identical theoretically and temporally to those raised in a previously filed class action suit which was denied class certification." *Id.* The Second Circuit concluded that the

"Supreme Court in *American Pipe* and *Crown, Cork* certainly did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints." *Id.*

c. The Fifth Circuit likewise rejected the rule adopted below in *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985). There the court rejected the argument that the *American Pipe* "tolling principle applies . . . not only for the first class certification petition filed but also for any subsequent petitions involving the same class." *Id.* at 1351. The court explained that there is "no authority for the[] contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely." *Id.* "To the contrary," the court concluded, "it has repeatedly been noted that 'the tolling rule [in class actions] is a generous one, inviting abuse,' and to construe the rule as plaintiffs would have us presents just such dangers." *Id.* (quoting *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring)).

d. The Eleventh Circuit has similarly held that "Plaintiffs may not piggyback one class action onto another and thus toll the statute of limitations indefinitely." *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) (internal quotation marks omitted). The court concluded that "the pendency of a previously filed class action does *not* toll the limitations period for additional class actions by putative members of the original asserted class." *Id.* (internal quotation marks omitted). Thus, the Eleventh Circuit agreed with the Fifth that "plaintiffs may not 'piggyback

one class action onto another,' and thereby engage in endless rounds of litigation in the district court and in this Court over the adequacy of successive named plaintiffs to serve as class representatives." *Id.* (quoting *Salazar-Calderon*, 765 F.2d at 1351).

The Eleventh Circuit has twice reaffirmed *Griffin*. *See Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1328 (11th Cir. 2015); *Love v. Wal-Mart Stores, Inc.*, 865 F.3d 1322, 1323 (11th Cir. 2017) ("In the Eleventh Circuit . . . [*American Pipe*] tolling is limited to individual, not class, claims." (citing *Griffin*)).

2. *The Third and Eighth Circuits Allow Tolling for Successive Class Actions in Some Circumstances, but Not When Class Certification Was Previously Considered and Denied.*

The Third and Eighth Circuits have held that *American Pipe* tolling can apply to subsequent class actions in *some* circumstances, i.e., "where class certification has been denied solely on the basis of the lead plaintiffs' deficiencies as class representatives, and not because of the suitability of the claims for class treatment." *Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004); *see also Great Plains Trust Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) (following *Yang*). But "*American Pipe* tolling does not apply where certification was denied based on deficiencies in the purported class itself." *Yang*, 392 F.3d at 99; *see also In re Cmty. Bank of N. Virginia Mortg. Lending Practices Litig.*, 795 F.3d 380, 409 n.27 (3d Cir. 2015) (Under *American Pipe*, "the filing of a class action lawsuit in federal court tolls the statute of limitation for the claims of unnamed class

members until class certification is denied or when the member ceases to be part of the class, at which point the class member may intervene or file an individual suit.").

Crucial to these courts' reasoning was that "[a]llowing tolling to apply to subsequent class actions where the original class was denied because of the lead plaintiffs' deficiencies as class representatives will not lead to the piggybacking or stacking of class action suits 'indefinitely.'" *Yang*, 392 F.3d at 112. Indefinite stacking of class actions is not a worry under this rule, the Third Circuit explained, because "applying tolling under these circumstances will allow subsequent classes to pursue class claims *until a court has definitively determined that the claims are not suitable for class treatment*." *Id.* (emphasis added). But where, as in this case, a court has already determined that class certification should be denied because of deficiencies with the putative class, *American Pipe* tolling no longer applies in the Third and Eighth Circuits.

3. *The Sixth, Seventh, and Ninth Circuits Extend* American Pipe *to Toll the Limitations Period for Otherwise Untimely Class Actions.*

The Sixth, Seventh, and Ninth Circuits construe *American Pipe* to apply to both individual and class actions and permit endless relitigation of class certification determinations.

a. The Seventh Circuit was the first court of appeals to hold that *American Pipe* tolling applies equally to individual and class actions. In *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d

560 (7th Cir. 2011), the Seventh Circuit concluded that *American Pipe* tolling applies to save late class actions and that any limitations on successive class actions have "nothing to do with tolling or *American Pipe*, and everything to do with the preclusive effect of the first decision, plus a proper application of Rule 23's criteria." *Id.* at 564. The Seventh Circuit, which decided *Sawyer* before this Court's holding in *Smith* that preclusion does not apply to class certification decisions, seems to have believed that preclusion principles would prevent previously absent plaintiffs from re-litigating a class certification denial.

b. The Sixth Circuit, following *Sawyer*, has concluded that "subsequent class actions timely filed under *American Pipe* are not barred." *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 652 (6th Cir. 2015). The court acknowledged that "[c]ourts may be required to decide whether a follow-on class action or particular issues raised within it are precluded by earlier litigation," but it rejected "the blanket rule advocated by Wal-Mart that *American Pipe* bars all follow-on class actions." *Id.*

The difference between *Phipps* and *Sawyer* is that *Phipps* was decided *after Smith*, so the Sixth Circuit had the benefit of this Court's holding that absent class members of uncertified classes are not subject to preclusion. *See Smith*, 564 U.S. at 313. The *Phipps* Court thus understood that preclusion rules cannot solve the problem of stacked class actions. The court in fact embraced this consequence, explaining that "the rule against non-party preclusion" necessarily "leads to relitigation of many is-

sues," but "existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of" addressing the problem of abusive stacking of class actions. 792 F.3d at 653.

c. The court of appeals below joined the Sixth and Seventh Circuits in holding that *American Pipe* tolling applies to class actions, meaning that admittedly untimely successive class actions may nevertheless go forward indefinitely—even when another court has found the exact same class unsuitable for class certification—subject only to (i) plaintiff-attorney self-restraint, (ii) admittedly inapplicable preclusion principles, and (iii) "comity." *See supra* at 10; App. 21a–22a.

The decision below demonstrates the expansive breadth of the legal rule announced in *Sawyer* and *Phipps*. While the Sixth and Seventh Circuits both generally extended *American Pipe* tolling to class actions, neither case actually applied that rule in a circumstance where certification of an identical class had already been denied. *See Sawyer*, 642 F.3d at 564–65 (class dismissed without considering whether certification was proper); *Phipps*, 792 F.3d at 648–49 (proposed new class differed in material respects from previous class in which certification was denied).

In this case, by contrast, the court of appeals *agreed* that respondents' securities-fraud claims are "based on the same facts and circumstances, *and on behalf of the same would-be class*, as in the *Dean* and *Smyth* Actions," App. 8a (emphasis added)—i.e., the two previous class actions in which the district court had denied class certification. The decision below

thus not only adopts the Sixth and Seventh Circuits' pronouncement that *American Pipe* applies to subsequent class actions, but also demonstrates the rule's extreme consequence: in these circuits, there is no limit to a plaintiff's ability to stack class actions, one after another, except for whatever weak protections the discretionary doctrine of "comity" may afford. The rule in these courts thus invites exactly the sort of endless, vexatious litigation Congress enacts statutes of limitations to prevent.

* * *

As a result of the decisional conflict just described, the viability of successive otherwise untimely class actions depends on the jurisdiction in which the plaintiff elects to file suit. Absent members of an uncertified class will be subject to strict enforcement of statutory time limits in the First, Second, Third, Fifth, Eighth, and Eleventh Circuits. But identically situated absent class members will be able to file successive class actions in the Sixth, Seventh, and Ninth Circuits without regard to statutes of limitations and subject only to whatever constraint principles of "comity" impose on district courts. That differential treatment of prospective plaintiffs and defendants, depending solely on where a suit is filed, should not be allowed to persist.

The petition for a writ of certiorari should be granted.

B. The Question Presented Is a Recurring Issue of National Importance, and This Case Presents an Ideal Vehicle for Resolving It.

1. Whether *American Pipe* tolling extends to successive class actions is a recurring question of national importance. At least nine courts of appeals have considered the question, *see supra* Section A, and district courts both within and outside those circuits continue to confront it.[1]

The effect of the conflict among the courts of appeals—and the need for national uniformity as to the question presented—is especially pronounced given the class action context. Any class action under a

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[1] *See, e.g.*, *Askins v. United States*, 113 Fed. Cl. 283, 288 (2013); *Folks v. State Farm Mut. Auto. Ins. Co.*, 281 F.R.D. 608, 614 (D. Colo. 2012); *Hershey v. ExxonMobil Oil Corp.*, 278 F.R.D. 617, 621 (D. Kan. 2011); *Dickson v. Am. Airlines, Inc.*, 685 F. Supp. 2d 623, 629–30 (N.D. Tex. 2010); *Gomez v. St. Vincent Health, Inc.*, 622 F. Supp. 2d 710, 712–14 (S.D. Ind. 2008); *Hunter v. Am. Gen. Life & Accident Ins. Co.*, 384 F. Supp. 2d 888, 891 (D.S.C. 2005); *Humes v. First Student, Inc.*, 2016 WL 5939436, at *3–6 (E.D. Cal. Oct. 11, 2016); *Barkley v. Pizza Hut of Am., Inc.*, 2015 WL 5008468, at *2 (M.D. Fl. Aug. 21, 2015); *Reaves v. Cable One, Inc.*, 2015 WL 12747944, at *4 (N.D. Ala. Mar. 16, 2015); *Lopez v. Liberty Mut. Ins. Co.*, 2015 WL 3630570, at *9 (C.D. Cal. Mar. 6, 2015); *Cleary v. Am. Capital, Ltd.*, 2014 WL 793984, at *3 (D. Mass. Feb. 28, 2014); *Love v. Wal-Mart Stores, Inc.*, 2013 WL 5434565, at *2–3 (S.D. Fla. Sept. 23, 2013); *Forde v. Waterman S.S. Corp.*, 2013 WL 5309453, at *5 (S.D.N.Y. Sept. 18, 2013); *Hull v. Wyeth*, 2012 WL 4857589, at *3 n.7 (S.D. Miss. Oct. 11, 2012); *Sheppard v. Capital One Bank*, 2007 WL 6894541, at *3 (C.D. Cal. July 11, 2007); *Vinson v. Seven Seventeen HB Phila. Corp.*, 2001 WL 1774073, at *6–7 (E.D. Pa. Oct. 31, 2001); *Lawrence v. Phillip Morris Cos.*, 1999 WL 51845, at *3 (E.D.N.Y. Jan. 9, 1999).

statute authorizing nationwide service of process can be brought in any circuit, and many other class actions can be brought in the Ninth Circuit given its expansive geographic reach. Because circuits applying *American Pipe* tolling to class actions "will attract actions in which courts in other circuits have denied class certification," *Yang*, 392 F.3d at 113–14 (Alito, J., concurring in part), the Sixth, Seventh, and Ninth Circuits will become magnets for the most abusive class actions—successive attempts to certify a class when previous certification attempts have failed. This Court's review is necessary to eradicate those forum shopping opportunities and establish uniformity as to this question of national importance.

2. This petition, moreover, provides an ideal vehicle through which to resolve the decisional conflict over the question presented. There is no dispute that, absent tolling of the statute of limitations during the pendency of the *Dean* and *Smyth* putative class actions—in which certification of the exact same class was denied—respondents' class action would be untimely under § 1658(b). App. 8a–9a. Nor is there any dispute that this action was "based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions." App. 8a.

This case thus squarely presents the purely legal question whether *American Pipe* tolling should be extended to absent class members' efforts to bring their own class actions. That question is outcome determinative here: If the Court grants certiorari and sides with the majority of courts of appeals that

have considered the question, the class claims will be rejected as time-barred. And there is no factual or jurisdictional impediment to this Court's deciding the question. The Court is unlikely to be presented with a better vehicle to resolve the circuit conflict.

C. The Decision Below Is Incorrect.

The Ninth Circuit erred in extending *American Pipe* to class actions. This Court's decisions have repeatedly "described *American Pipe* as creating a tolling rule, necessary to permit the ensuing *individual actions* to proceed." *ANZ Sec.*, 137 S. Ct. at 2054–55 (emphasis added); *see also Smith*, 564 U.S. at 313 n.10 (describing *American Pipe* as holding that "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*" (emphasis added)); *Irwin*, 498 U.S. at 96 n.3 (describing *American Pipe* as holding that "plaintiff's timely filing of a defective class action tolled the limitations period *as to the individual claims* of purported class members" (emphasis added)). These precedents begin with *Crown, Cork*, which announced a clear rule for when *American Pipe* tolling ends: "Once the statute of limitations has been tolled [under *American Pipe*], it remains tolled for all members of the putative class *until class certification is denied*." *Crown, Cork*, 462 U.S. at 354 (emphasis added). At that point, the Court explained, "class members may choose to *file their own suits* or to *intervene as plaintiffs* in the pending action." *Id.* (emphasis added).

The decision below turns that principle on its head. Under the Ninth Circuit's ruling, class mem-

bers are not limited to bringing their own suits or to intervening in the pending action, meaning the tolling period ends only when previously absent plaintiffs stop trying to certify new class actions. That rule cannot be reconciled with the principles animating *American Pipe* tolling and would lead to significant adverse policy consequences. Nothing in this Court's decisions justifies that result.

1. a. "Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli*, 568 U.S. at 448 (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)). These statutory limits "inevitably reflec[t] [Congress's] value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Ricks*, 449 U.S. at 260. Thus, enforcement of statutory time bars is "vital to the welfare of society," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), and integral to the "evenhanded administration of the law," *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam).

Congress, however, is also presumed to "legislate[] against a background of common-law adjudicatory principles." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (internal quotation marks omitted). This background includes "[e]quitable tolling, a long-established feature of American jurisprudence derived from 'the old chancery rule.'" *Id.*

(quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). But equitable tolling applies only when "some *extraordinary circumstance* stood in [the plaintiff's] way and prevented timely filing." *Menominee Indian Tribe*, 136 S. Ct. at 755 (internal quotation marks omitted and emphasis added). Equitable tolling rules "are very limited in character, and are to be admitted with great caution; otherwise, the court would make the law instead of administering it." *Gabelli*, 568 U.S. at 454 (internal quotation marks omitted).

b. In *American Pipe* and *Crown, Cork*, this Court recognized a specific "equitable tolling" rule applicable to class actions. *See Irwin*, 498 U.S. at 96 & n.3; *ANZ Sec.*, 137 S. Ct. at 2051 (holding *American Pipe* rule is "equitable"); *Young v. United States*, 535 U.S. 43, 49 (2002) (same). Those cases held that when a class action is timely filed, the statute of limitations must be tolled as a matter of equity to allow absent class members to subsequently bring their own *individual* claims (either through new complaints or intervention in the pending action) that would otherwise be untimely. *See American Pipe*, 414 U.S. at 553; *Crown, Cork*, 462 U.S. at 354. The concern was that if the time to intervene were not tolled during the pendency of a class action, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *American Pipe*, 414 U.S. at 553. *Crown, Cork* extended this reasoning to absent class members' own individual actions, explaining that without the benefit of tolling, "class members would not be able to rely on the existence of the suit

to protect their rights," which would result in "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." 462 U.S. at 350–51.

This policy of avoiding unnecessary prophylactic *individual* actions during the pendency of class actions does not justify permitting successive *class* actions. *American Pipe* tolling applies to individuals who relied on a class action but subsequently determined that they wish to come forward to assert their (own) rights. Tolling the limitations clock in that situation relieves absent class members of the need to file potentially unnecessary individual actions and avoids needlessly burdening the courts, all of which is consistent with the more general rule that tolling applies only when the plaintiff can establish some "extraordinary circumstance" that "prevented timely filing." *Menominee Indian Tribe*, 136 S. Ct. at 755 (internal quotation marks omitted).

By contrast, plaintiffs who want to assert rights on behalf of others can act during the pendency of the existing putative class action and do not require the special protection of equitable tolling. They can, for example, seek a leadership role in the pending class action. Indeed, this case is governed by the PSLRA, which includes a detailed mechanism for early notice to potential class members to give anyone who wants to lead the class action the opportunity to do so. *See* 15 U.S.C. § 78u-4(a)(3). There is no dispute that the PSLRA governed the two prior classes in this case, yet respondents did nothing. *See supra* at 8. Alternatively, an absent class member

can file her own representative action and then seek consolidation with any other already-filed actions, including through the federal multi-district litigation procedure. There is simply no "need" to protect absent class members' *own* rights and interests by ensuring that if certification is denied, they can still pursue an action on *others'* behalf.

c. Recognizing tolling for subsequent class actions would also result in adverse policy consequences that do not arise when tolling is limited to individual actions.

Most obviously, as then-Judge Alito recognized, the tolling rule the Ninth Circuit adopted below "could extend the statute of limitations almost indefinitely." *Yang*, 392 F.3d at 113 (Alito, J., concurring in part). The court of appeals' perpetual tolling rule, in other words, "would allow a purported class almost limitless bites at the apple as it continuously substitutes named plaintiffs and relitigates the class certification issue." *Ewing*, 795 F.3d at 1326. And after *Smith*, preclusion rules would provide no impediment to former absent class members'—and their attorneys'—attempts to stack class actions perpetually. *American Pipe* should not be construed to encourage such abusive litigation.

The Ninth Circuit rule, moreover, fundamentally undermines "basic policies of all limitations provisions," i.e., "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). According to the Ninth Circuit itself, the only impediments to perpetual class actions are (i) attorney self-restraint, which

can be elusive to say the least; (ii) preclusion, which does not apply to claims brought by absent class members; and (iii) comity, which is as vague as it is rare. App. 22a. But the whole point of statutes of limitations is to preclude stale claims *without* resort to such nebulous notions and discretionary doctrines. It is one thing to equitably toll limitations period for a short and finite period to allow individuals to bring their own claims. But a rule allowing a string of previously absent class members to try their hand at certifying a class simply cannot be reconciled with the existence of a statute of limitations.

Finally, the court of appeals' rule makes it much more difficult to timely settle disputes. Class certification is often the inflection point at which disputes are settled. Plaintiffs (and their attorneys) are normally unwilling to settle claims before class certification because if a class is certified, the value of the claim increases dramatically. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). If, however, class certification is denied, the parties are often willing to settle individual claims quickly because a contingency-fee plaintiff's attorney has little economic incentive to pursue the claims. Perpetual stacking of class actions distorts this result, because a decision denying class certification does not spell the end of the class action. It merely encourages an attorney to find new plaintiffs and "a district court judge who is willing to certify the class." *Yang*, 392 F.3d at 113 (Alito, J., concurring in part).

Extending *American Pipe* to toll the limitations period for new class actions is thus inconsistent with the equitable principles animating *American Pipe* and *Crown, Cork*—not to mention the purpose of statutes of limitations—and its adoption would lead to significant adverse consequence. The Ninth Circuit's conclusion that *American Pipe*'s equitable tolling rule extends to new class actions should be rejected.

2. a. The court of appeals' contrary conclusion is based on a misunderstanding of the *American Pipe* tolling rule. The court appears to have assumed that *American Pipe* broadly allows for tolling of the limitations period for absent class members' claims, which then can be aggregated under Rule 23. App. 17a. The court, in other words, appears to believe that if an individual is authorized to bring an individual claim, she is also *automatically* authorized to aggregate the claim under Rule 23 so long as that rule's preconditions are satisfied. App. 17a, 21a–22a.

That analysis fundamentally misreads *American Pipe*. As explained earlier, the point of *American Pipe* is to allow absent class members *who want to bring individual actions* to do so without having to resort to wasteful protective litigation. *American Pipe* tolling, in other words, does not apply to absent class members who remain absent, because absent class members who choose to remain absent do not require tolling. *Cf. Menominee Indian Tribe*, 136 S. Ct. at 755 (equitable tolling can apply only when the plaintiff "has been pursuing his rights diligently"). Yet the effect of applying *American Pipe* to follow-on

class actions is to toll the limitations period not only for the new named plaintiffs, but also for individuals who continue to remain absent—i.e., individuals who have shown no interest in pressing their own individuals claims—and thus have no plausible entitlement to tolling. Nothing in *American Pipe*, or in equitable tolling principles more generally, supports that result.

Even setting aside its misreading of *American Pipe*, the court of appeals' reasoning is backwards. Limitations periods apply unless there is some "extraordinary circumstance" that requires the period to be tolled. In other words, when an individual files a claim outside the limitations period, that claim is time-barred *unless* there is some particularly compelling reason to allow it go forward. *American Pipe* and *Crown, Cork* found compelling reasons—allowing absent class members to rely on a pending class action and thereby avoid prophylactic, duplicative litigation—to permit absent class members to bring their own otherwise untimely claims. *See supra* at 23–24. But as just explained, there is no good reason to allow tolling of a limitations period so that a previously absent class member can bring another action on others' behalf. *See supra* at 24–25. In fact, allowing tolling in those circumstances would benefit only plaintiffs' counsel and lead to affirmatively negative consequences. *See supra* at 25–26. The court should thus refuse to expand the tolling of the limitations period to permit plaintiffs to assert untimely claims for not only themselves but also absent class members.

b. The court of appeals relied on three recent cases from this Court that it believed support its reasoning. But those cases are either inapposite or affirmatively refute the Ninth Circuit's conclusion.

The court of appeals cited *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), but that decision is not about tolling at all. It addressed whether, under the *Erie* doctrine, a state law limiting the certifiability of certain classes can bind federal courts sitting in diversity. *See id.* at 398. *Shady Grove* stands for the unexceptional proposition that only Congress, not a state, can create exceptions to the Federal Rules of Civil Procedure. Thus, it holds that all claims that can be brought in federal court can be aggregated under Rule 23, even if such claims could not be aggregated if brought in state court. *Id.* at 398–406. But that holding says nothing about whether *indisputably untimely* claims (like respondents') can be brought as class actions under Rule 23. To the contrary, *Shady Grove* makes clear that Rule 23 "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* at 408 (plurality opinion). The question whether otherwise untimely claims can nevertheless proceed is answered not under Rule 23, but under the statute of limitations and equitable tolling principles. And those principles unambiguously preclude tolling for the reasons already explained.

The court of appeals next relied on *Smith*, but that decision also did not concern *American Pipe* tolling, and its reasoning actually undermines rather than supports the conclusion below. *Smith*'s central

holding is that when class certification fails, preclusion does not apply to subsequent individual actions brought by absent class members. *See* 564 U.S. at 315. In other words, preclusion is not the proper mechanism to prevent serial re-litigation of class certification. That problem is solved by limiting *American Pipe* tolling as this Court envisioned: to individual claims. Indeed, when *Smith* did mention *American Pipe* in a footnote, it reaffirmed that decision's limitation to individual claims, explaining that "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*." *Id.* at 313 n.10 (emphasis added).

Finally, the court of appeals cited *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), but it is unclear why—the decision makes no reference to *American Pipe* tolling or the interplay between statutes of limitations and class actions. The court of appeals itself described *Tyson Foods* as considering "whether class action plaintiffs could use statistical sampling evidence to prove liability to a class." App. 20a (citing 136 S. Ct. at 1046–48). That question has nothing to do with the issue presented here.

The decision below, in short, misunderstood the principles underlying *American Pipe* tolling and misconstrued the Court's class action precedents. Under a proper application of the equitable principles animating *American Pipe*, and a faithful reading of this Court's precedents, *American Pipe* tolling applies while a timely filed class action is pending to permit only the filing of otherwise untimely *individual* actions, not follow-on class actions. This Court should

grant certiorari to resolve the circuit conflict on that issue and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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