No. 17-432

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

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND RETAIL LITIGATION CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND RETAIL LITIGATION CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America and Retail Litigation Center respectfully move for leave to file the accompanying *amici curiae* brief in support of petitioner. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has withheld consent.

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including class action matters.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-

industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases, including those brought as class actions. The RLC frequently files *amicus curiae* briefs on behalf of the retail industry.

Amici's members and affiliates have a keen interest in ensuring that courts even-handedly enforce the substantive and procedural requirements applicable to class action lawsuits. The class action procedure cannot alter the substantive law, and class actions should be subject to the same rules regardless of where they are filed. The decision below, however, erroneously extends a judicially created tolling doctrine to effectively eliminate Congressionally mandated statutes of limitations in a recurring class action scenario, exacerbating an existing and acknowledged circuit conflict on an important and recurring question of nationwide importance.

Respectfully submitted,

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October 23, 2017

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INTEREST OF *AMICI CURIAE*[*]

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including class action matters.

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part and no one other than *amici* and their counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel for *amici curiae* states that counsel for petitioner and respondents received timely notice of *amici*'s intent to file this brief. Counsel for petitioner provided written consent. Counsel for respondents withheld consent, necessitating the accompanying motion for leave to file under Rule 37.2(b).

industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases, including those brought as class actions. The RLC frequently files *amicus curiae* briefs on behalf of the retail industry.

Amici's members and affiliates have a keen interest in ensuring that courts even-handedly enforce the substantive and procedural requirements applicable to class action lawsuits. The class action procedure cannot alter the substantive law, and class actions should be subject to the same rules regardless of where they are filed. The decision below, however, erroneously extends a judicially created tolling doctrine to effectively eliminate Congressionally mandated statutes of limitations in a recurring class action scenario, exacerbating an existing and acknowledged circuit conflict on an important and recurring question of nationwide importance. This Court's review is warranted.

SUMMARY OF ARGUMENT

Under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), "the commencement of a class action suspends the applicable statute of limitations" for all members of the putative class. *Id.* at 554. If the class is rejected, tolling stops and the statute of limitations resumes running. *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 351-54 (1983). Former class members who wish to pursue their claims must, within the remaining limitations period, individually file suit or move to intervene in a timely filed action. *Smith* v. *Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011) ("[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").

I. The courts of appeals are split on whether *American Pipe* tolling extends to successive (or "stacked") class actions—reviving the claims of absent persons who did not themselves act after class certification was denied in the first case.

The majority of Circuits have said "no," holding that such claims are untimely because *American Pipe* tolling comes to an end with the first class certification decision. That is the clear import of this Court's tolling precedents. *See Crown, Cork*, 462 U.S. at 354 ("[T]he statute of limitations … remains tolled for all members of the putative class *until* class certification is denied") (emphasis added). Moreover, "[w]ithout this restriction on tolling, lawyers seeking to represent a plaintiff class could extend the statute of limitations almost indefinitely until they find a district court judge who is willing to certify the class." *Yang* v. *Odom*, 392 F.3d 97, 113 (3d Cir. 2004) (Alito, J., concurring in part and dissenting in part).

In the decision below, however, the Ninth Circuit joined a minority of Circuits that have said "yes," holding that *American Pipe* tolling extends to otherwise untimely claims asserted on behalf of absent persons in a successive class action. This approach is premised on the notion that *American Pipe* tolling inheres in Rule 23 itself, so that every class action automatically tolls the claims of putative class members even if those same claims have previously been tolled in a failed class action. *See* Pet. App. 17a-18a.

This open and acknowledged conflict among the courts of appeals requires resolution to ensure that

plaintiffs *and* defendants in class actions are treated similarly regardless of where the successive suit is filed.

II. This Court's post-*American Pipe* decisions make clear that the minority approach—*i.e.*, extending tolling to claims asserted on behalf of absent persons in successive or "stacked" class actions—is wrong.

First, the Court confirmed last Term that *American Pipe* tolling is equitable in nature, rather than stemming from a statute or Federal Rule of Civil Procedure 23. *Cal. Pub. Emps.' Ret. Sys.* v. *ANZ Secs., Inc.*, 137 S. Ct. 2042, 2051 (2017). That directly, and completely, undercuts the reasoning of the decisions, including that of the Ninth Circuit below, that have rejected the anti-stacking rule.

Second, equitable tolling ordinarily requires a showing of diligence and extraordinary obstacles to timely filing in the case at hand. *See Menominee Indian Tribe of Wisc.* v. *United States*, 136 S. Ct. 750, 755 (2016). *American Pipe* tolling, in contrast, applies simply because a case is filed as a proposed class action. This departure from traditional equity practice becomes more pronounced, and problematic, in successive class actions.

Third, the *American Pipe* tolling doctrine is at odds with the separation of powers concerns that have animated the Court's recent decisions curtailing judicial modification of statutory deadlines. As the Court has emphatically warned since *American Pipe*, courts "are not at liberty to jettison Congress' judgment on the timeliness of suit." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 (2014).

Fourth, this Court has repeatedly reiterated that the Rules Enabling Act, 28 U.S.C. § 2072, prohibits using the class action device to "giv[e] plaintiffs … different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods, Inc*. v. *Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016). Yet extending *American Pipe* tolling to stacked class actions would allow claims to proceed because they are asserted in a proposed class action even when the identical claims would clearly be time-barred if asserted individually.

These post-*American Pipe* decisions indicate that *American Pipe* would not be decided the same way today, and call into serious question the continued viability of the tolling doctrine announced in *American Pipe*. At minimum, they show that *extension* of the *American Pipe* doctrine to stacked class actions is unwarranted, inequitable, and unlawful, and thus that the decision below should be reversed.

ARGUMENT

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. If the class is not certified, then putative class members must individually file suit, or move to intervene in a timely action, within the remaining limitations period. *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 351-54 (1983). As this Court recently summarized the *American Pipe* tolling doctrine: "[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." *Smith* v. *Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011).

I. THE CIRCUITS ARE SPLIT ON EXTENDING *AMERICAN PIPE* TOLLING TO SUCCESSIVE CLASS ACTIONS.

As the petition for a writ of *certiorari* ably demonstrates (at 11-18), the courts of appeals have split deeply on the question presented here—whether *American Pipe* tolling can be extended beyond the first certification decision to the claims asserted ostensibly on behalf of absent persons in a second (or third or fourth) class action.

The majority of the courts of appeals have (correctly) said "no," and held that *American Pipe* tolling does not extend past the initial decision on class certification. *See Basch* v. *Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998); *Korwek* v. *Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Yang* v. *Odom*, 392 F.3d 97, 104 (3d Cir. 2004); *Angles* v. *Dollar Tree Stores, Inc.*, 494 F. App'x 326, 331 n.10 (4th Cir. 2012); *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985); *Great Plains Tr. Co.* v. *Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007); *Ewing Indus. Corp.* v. *Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1325 (11th Cir. 2015). Once that decision has been made, proposed members of the (rejected) class seeking to protect their rights must individually file suit or intervene in a timely action—just as this Court has held. *See Crown, Cork*, 462 U.S. at 354; *Smith*, 564 U.S. at 313 n.10.

These courts have adopted what has become known as the "anti-stacking" rule, which prevents interminable litigation by limiting *American Pipe* tolling to the first proposed class action. As then-Judge

Alito explained: "Without this restriction on tolling, lawyers seeking to represent a plaintiff class could extend the statute of limitations almost indefinitely until they find a district court judge who is willing to certify the class. The lawyers could simply file a new, substantively identical action with a new class representative as soon as class certification is denied in the last previous action." *Yang*, 392 F.3d at 113 (Alito, J., concurring in part and dissenting in part). Under the anti-stacking approach, all claimants in any subsequent (or "stacked") lawsuits, including putative class members, must comply with the limitations periods enacted by Congress. That approach prevents claimants "from sleeping on their rights," *Crown, Cork*, 462 U.S. at 352, and in turn ensures fair adjudication by ensuring that claims are brought before "evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli* v. *SEC*, 568 U.S. 442, 448 (2013) (quotation omitted).

Two courts of appeals—the Ninth Circuit in the decision below, following a similar decision by the Sixth Circuit—have abandoned earlier decisions endorsing the anti-stacking rule and (erroneously) ruled that the *American Pipe* doctrine can be extended to toll the claims asserted on behalf of absent persons in a second or successive class action. Pet. App. 12a-22a; *Phipps* v. *Wal-Mart Stores, Inc.*, 792 F.3d 637, 645 (6th Cir. 2015). These decisions are based largely on misapprehensions of this Court's decisions in *Shady Grove Orthopedic Associates* v. *Allstate Insurance Co.*, 559 U.S. 393 (2010), which says *nothing* about *American Pipe* tolling; and *Smith* v. *Bayer*, where the only mention of *American Pipe* tolling is expressly limited to subsequent *individual* actions. *See* 564 U.S. at 313 n.10.

The perpetual tolling rule endorsed by the Ninth and Sixth Circuits takes as its essential—but unexamined—premise the proposition that the claims of absent persons in a proposed class action are automatically tolled by operation of Rule 23 itself. Thus, to these courts, it makes no matter whether the claims are asserted in an initial or subsequent class action; so long as some named plaintiff with a timely claim proposes to proceed as a class representative, the claims of all persons in the proposed class are automatically tolled (and tolled, and tolled, and tolled) for each successive class action filed. *See* Pet. App. 17a-19a; *Phipps*, 792 F.3d at 645.

The Seventh Circuit has taken a different tack, confusing the issue by casting the tolling question in preclusion terms—*i.e.*, whether the first decision on class certification "binds" the absent class members. *See Sawyer* v. *Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563-64 (7th Cir. 2011). That approach does not survive this Court's subsequent decision in *Smith* v. *Bayer*, which held that "[n]either a proposed class action nor a rejected class action may bind nonparties," including unnamed persons who would be members of a proposed class that is not certified. 564 U.S. at 314. The Seventh Circuit has not, however, revisited its approach.

The open and acknowledged conflict among the Circuits regarding the anti-stacking rule requires resolution by this Court. As things stand, the identical claims are untimely if brought in federal court in Florida, New York, and Texas; but timely in Ohio and California. This kind of disuniformity is antithetical to Rule 23, which applies regardless of the type of suit or the federal court where it is brought. *See Shady Grove*, 559 U.S. at 409 (plurality) ("A Federal Rule of

Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others"). Either the claims of absent persons in a stacked class action are tolled or they are not. Only this Court can resolve the conflict. *See* Pet. 19-21. And as explained next, the minority rule—as exemplified by the decision below—is wrong.

II. THE DECISION BELOW IS IRRECONCILABLE WITH THIS COURT'S PRECEDENTS.

Last Term, the Court decided *California Public Employees' Retirement System* v. *ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), its first major *American Pipe* tolling case in decades. In *CalPERS*, the Court expressly declined to extend *American Pipe* tolling to statutes of repose. *Id.* at 2055. The Court also removed any lingering question about the basis for *American Pipe* tolling—it "is the judicial power to promote equity, rather than to interpret and enforce statutory provisions." *Id.* at 2051. Significantly, these holdings came on the heels of numerous cases limiting equitable modification of statutory time limits (*e.g.*, *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 (2014)), as well as decisions enforcing the Rules Enabling Act's "pellucid instruction that use of the class device cannot 'abridge … any substantive right.'" *Tyson Foods, Inc*. v. *Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (quoting 28 U.S.C. § 2072(b)) (alteration original).

Taken together, these decisions call into serious question the continued viability of the *American Pipe* tolling doctrine, which warrants reconsideration in an appropriate case. At minimum, the Court's post-*American Pipe* precedents establish that the Ninth and Sixth Circuits erred in *extending* the equitable tolling authorized in *American Pipe* beyond the first

class certification decision, to allow a succession of named plaintiffs to endlessly litigate substantially similar claims, ostensibly on behalf of unnamed individuals, without regard to congressionally imposed timely filing limits.

First, *CalPERS* put to rest the notion that *American Pipe* tolling is somehow inherent in or required by Rule 23. The Court squarely held that the doctrine is "grounded in the traditional equitable powers of the judiciary," rather than "mandated by the text of a statute or federal rule." 137 S. Ct. at 2052; *see also ibid.* (*American Pipe* tolling is an exercise of "traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice"). As the Court explained it, "nor could it" be otherwise, because "Rule 23 does not so much as mention the extension or suspension of statutory time bars." *Ibid.*

In allowing stacked class actions, both the Ninth Circuit (in the decision below) and the Sixth Circuit (in the decision that the Ninth Circuit followed) uncritically accepted the premise that *American Pipe* tolling stemmed from Rule 23. Each of them relied on the Rule 23 analysis in *Shady Grove* (a case which said nothing about *American Pipe* tolling) to support expanding *American Pipe* tolling. *See* Pet. App. 17a (asserting that *Shady Grove* "confirmed" the availability of such tolling); *Phipps*, 792 F.3d at 652 (citing *Shady Grove* and holding that disallowing stacked class actions would "eviscerate Rule 23"); *cf. Sawyer*, 642 F.3d at 564 (arguing that the anti-stacking decisions "cannot be reconciled" with *Shady Grove*). That logic, dubious from the start, does not survive *CalPERS*.

CalPERS held in so many words that *American Pipe* tolling is not dictated by Rule 23; and in so doing, the Court obliterated the suggestion—accepted by the court below—that the claims of proposed class members are *automatically* tolled whenever a case is brought as a class action. Rather, because *American Pipe* tolling is an equitable doctrine, any litigant or court proposing to extend it beyond the bounds established by the Supreme Court (in *American Pipe* and *Crown Cork*) has the burden of showing that such an extension is equitable. Neither plaintiffs nor the Ninth Circuit in this case even attempted to make such a showing.

Second, while *American Pipe* tolling is equitable, the Court in *American Pipe* "did not consider the criteria of the formal doctrine of equitable tolling in any direct manner," such as "whether the plaintiffs pursued their rights with special care; whether some extraordinary circumstance prevented them from intervening earlier; or whether the defendant engaged in misconduct." *CalPERS*, 137 S. Ct. at 2052; *see also American Pipe*, 414 U.S. at 551 (acknowledging that its reasoning extended to cover even "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)").

That blanket approach is incompatible with the Court's return to the traditional view that equitable tolling "is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace* v. *Kato*, 549 U.S. 384, 396 (2007). As the Court has recently reconfirmed, a "litigant is entitled to equitable tolling … *only* if" he carries the burden of showing both that "'he has been pur-

suing his rights diligently,'" and "'that some extraordinary circumstance stood in his way and prevented timely filing.'" *Menominee Indian Tribe of Wisc.* v. *United States*, 136 S. Ct. 750, 755 (2016) (emphasis added) (quoting *Holland* v. *Florida*, 560 U.S. 631, 649 (2010)); *see also Petrella*, 134 S. Ct. at 1975 & n.17 (explaining that equitable tolling is available in "appropriate circumstances," such as "a party's infancy or mental disability, absence of the defendant from the jurisdiction, [or] fraudulent concealment"). Yet until the first class certification decision has been made, *American Pipe* tolling is available by right, regardless of the facts of the particular case.

Third, the *American Pipe* tolling doctrine raises significant separation-of-powers concerns. Statutory time 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." *Del. State Coll.* v. *Ricks*, 449 U.S. 250, 260 (1980) (quotation omitted). Courts have no free-floating "liberty to jettison Congress' judgment on the timeliness of suit." *Petrella*, 134 S. Ct. at 1967. That is because "separation-of-powers principles" preclude giving courts such a "legislation-overriding" role. *SCA Hygiene Prods. Aktiebolag* v. *First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (quotation omitted). Thus the Court has warned that judicially created exceptions to statutory deadlines must be "'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 (quoting *Amy* v. *Watertown (No. 2)*, 130 U.S. 320, 324 (1889)).

Indeed, the Court has refused to endorse other types of equitable relief from timeliness requirements when doing so is at odds with the specific statutory context. For example, in *Gabelli*, the Court considered whether a discovery rule can toll the government's deadline to bring a fraud case under a statute of limitations covering a wide range of civil enforcement actions. *See* 568 U.S. at 444-45. The Court refused to afford the government the same benefit given a private plaintiff in a fraud case, explaining that the reasoning for allowing such relief "does not follow for the Government in the context of enforcement actions for civil penalties." *Id.* at 451. And in *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014), the Court held that statutes of repose cannot be equitably adjusted at all because that would interfere with a "a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *Id.* at 2183 (quotation omitted).

This strictness is not reserved for plaintiffs: On the defense side, the Court has all but abandoned the venerable doctrine of laches, holding that courts cannot assume a "legislation-overriding" role by barring suits that are timely under the relevant statute of limitations. *Petrella*, 134 S. Ct. at 1975; *see also SCA Hygiene Prods.*, 137 S. Ct. at 960 ("When Congress enacts a statute of limitations, it speaks directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief").

Fourth, *American Pipe* tolling is hard to square with the Rules Enabling Act—even when used to allow *individual* suits that would otherwise be untimely, and all the more so when improperly extended to allow successive class actions which serve to revive otherwise long-expired claims. As the Court recently

reiterated, the Rules Enabling Act does not permit interpretation or implementation of procedural rules in a way that "giv[es] plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods*, 136 S. Ct. at 1048; *see also Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (observing that claiming "Rule 23 establish[es] an entitlement to class proceedings" would "likely" run afoul of the Rules Enabling Act).

American Pipe tolling allows claims that would be time-barred if pursued individually to proceed solely on the basis of the claimants' passive involvement in a putative, and failed, class action. This defect is compounded by extending *American Pipe* to allow stacked class actions. Still-absent individuals, whose claims have long ago expired, are accorded tolling rights a second time by virtue of "participating" as unnamed class members in the second class action. Their expired claims are resuscitated, deemed timely, and tolled anew. If the second class is also rejected, these same individuals are then free to be part of a *third* round of litigation, either as individual litigants or, yet again, as unnamed class members. Nothing will stop such zombie claims from rising again and again, all because Rule 23 provides the procedural device of class actions. *See Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims").

In the context of the case now before the Court, the Rules Enabling Act inquiry is a simple one: Are the absent persons in the successive class action being afforded different rights simply because the second proceeding was filed as a proposed class action? The

answer is equally simple: Yes—their claims are clearly untimely, yet the Ninth Circuit allowed them to proceed. But for extension of *American Pipe* tolling, they would have no claim at all.

* * *

To summarize, *American Pipe*'s blanket approach to tolling—which suspends the running of statutory timely filing limits for every would-be member of the putative class—cannot be squared with these recent decisions restricting the Judiciary's ability to override statutory timely filing limits. *American Pipe* tolling is equitable (and discretionary), not legal (or automatic). Yet, unlike traditional equitable tolling, the *American Pipe* doctrine entails no examination into the behavior of the parties in a particular case. As such, *American Pipe* impinges upon the constitutional line separating judicial powers from legislative functions. And in many cases *American Pipe* tolling will contravene the dictates of the Rules Enabling Act. It seems abundantly clear that *American Pipe* would not be decided the same way today, and in an appropriate case—indeed, perhaps in this case—the Court may wish to consider overruling it.

At the very least, the Court's post-*American Pipe* precedents preclude a further *expansion* of tolling to benefit individuals who fail to come forward and assert their own rights after the first class action fails. In other words, the Court could—as a matter of *stare decisis*—elect to retain the *American Pipe* tolling doctrine as articulated in *American Pipe* itself, clarified in *Crown Cork*, and summarized in *Smith v. Bayer*. *Cf. Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411-13 (2014). But there is no basis for *extending* the doctrine beyond its established boundaries, as this Court recognized just last Term.

CalPERS, 137 S. Ct. at 2052. The Ninth Circuit's contrary approach eviscerates Congress's considered policy decisions by allowing putative class action plaintiffs to toll filing deadlines indefinitely by filing seriatim class actions. It also interferes with limitations periods' "vital" function of "giving security and stability to human affairs." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879). Allowing tolling in stacked class actions eliminates not only the right to repose established by even-handed application of statutes of limitations, but to finality in any form—even where class certification has failed and individual claims have been resolved.

The only individuals who benefit from extending tolling to stacked class actions are class action lawyers and the unnamed (and unknown) persons who have done nothing to protect their own rights by filing an action or intervening following failure of the first class action—in other words, the ones who *have* "slept on their rights." *American Pipe*, 414 U.S. at 561 (Blackmun, J., concurring). They are the ones who have not "pursued [their] rights diligently," nor were they "prevent[ed] … from bringing a timely action" by "some extraordinary circumstance." *CalPERS*, 137 S. Ct. at 2050 (quoting *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014)). And they are the ones who equity cannot, should not, and will not assist.

Concurring in *American Pipe*, Justice Blackmun warned that the decision "must not be regarded" as a way to "save members of the purported class who have slept on their rights." 414 U.S. at 561 (Blackmun, J., concurring). And Justice Powell, joined by Justices Rehnquist and O'Connor, concurred in *Crown, Cork* to "reiterate" Justice Blackmun's warning, expressing

concern that "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse." 462 U.S. at 354 (Powell, J., concurring). The time has come for the Court to heed these warnings.

The decision below reflects a willingness to override legislative determinations regarding the timeliness of suit that cannot be reconciled with a long line of decisions that this Court has issued since *American Pipe* was decided in 1974. *American Pipe* would not be decided the same way today, and the Court may wish to consider whether it should be overruled. At minimum, however, it should not—*cannot*—be extended beyond its extant limits, yet that is exactly what the Ninth Circuit did in tolling the claims of absent persons in a successive class action. Review and reversal are warranted here.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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