No. 17-432

In the Supreme Court of the United States

CHINA AGRITECH, INC.,
Petitioner,

v.

MICHAEL H. RESH, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

BETSY C. MANIFOLD
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
750 B Street, Suite 2770
San Diego, California 92101
619.239.4590

DAVID A.P. BROWER
BROWER PIVEN
A Professional Corporation
475 Park Avenue South, 33rd Floor
New York, New York 10016
212.501.9000

MATTHEW M. GUINEY
Counsel of Record
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Avenue
New York, New York 10016
212.545.4600
guiney@whafh.com

Attorneys for Respondents William Schoenke, Heroca Holding, B.V., and Ninella Beheer, B.V.

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

COUNTER-STATEMENT OF THE 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." (Emphasis added). 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 whose claims are also timely as a result of *American Pipe* tolling.

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Respondents William Schoenke, Heroca Holding, B.V., and Ninella Beheer, B.V. (hereinafter "Respondents"), respectfully submit this opposition to the petition for a writ of certiorari filed by China Agritech, Inc. ("China Agritech" or "Petitioner").[1]

INTRODUCTION

Respondents filed a class action alleging that China Agritech and its managers and directors violated the Securities Exchange Act of 1934 ("Exchange Act"). Respondents were unnamed plaintiffs in two earlier-filed class actions against many of the same defendants based on the same underlying events. The district court denied class certification in both of the prior actions only because of defects specific to the named plaintiffs in those actions. Under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), the statute of limitations was tolled during the pendency of both of the earlier actions for Respondents' claims as well as the claims of all asserted members of the class. As the Petitioner conceded and the district court held, there was no time bar preventing Respondents from bringing the present action on an individual basis. Rather, the Petitioner argued that the undoubtedly timely-filed claims could not be pursued as a class action under Rule 23, but could only be pursued in a multiplicity of individual actions. The United States Court of Appeals for the Ninth Circuit

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[1] Michael Resh, one of the plaintiffs in the action, recently passed away. A statement of fact of death was filed in the district court on October 4, 2017. Consequently, Mr. Resh is not included as a Respondent herein.

rejected that argument and ruled that Respondents' class action complaint was timely filed. The Ninth Circuit held that because Respondents' individual claims were tolled under *American Pipe* and *Crown, Cork & Seal* during the pendency of the prior actions (as were the claims of all putative class members), the Respondents were entitled to bring their timely individual claims as named plaintiffs in a would-be class action.

The petition for a writ of certiorari should be denied for three reasons.

First, the Ninth Circuit's decision that timely-filed claims under *American Pipe* may be pursued as a class action presents no conflict among the circuits requiring resolution by this Court. Every Court of Appeals to consider this issue in light of this Court's opinions in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010) and *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), has held that a plaintiff is entitled to assert timely claims on behalf of all asserted members of a class (who also have timely claims) and that denial of certification in an earlier case cannot bar a plaintiff with timely claims from seeking class certification in a later case. The Sixth, Seventh and Ninth Circuits have now held that denying a plaintiff the right to pursue timely claims on behalf of a putative class of all those similarly situated would be inconsistent with: (i) this Court's ruling in *Shady Grove* that Rule 23 permits any plaintiff whose claims meet its criteria to pursue those claims on behalf of a class; and (ii) this Court's ruling in *Smith v. Bayer* that denials of class certification are not binding on absent class members in subsequent cases.

Second, those Courts of Appeals that considered whether plaintiffs with timely claims could also bring those claims in a subsequent class action prior to this Court's *Shady Grove* and *Smith v. Bayer* opinions were each animated by a concern that allowing plaintiffs with timely claims to seek class certification in later cases would lead to the "indefinite" and "endless" relitigation of class certification determinations. Those concerns are without merit based on this Court's decision in *Smith v. Bayer* directing district courts to simply "apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 317. Those concerns should be further mitigated if not rendered moot by this Court's recent opinion in *California Public Employees' Retirement System v. ANZ Securities Inc.*, 137 S. Ct. 2042 (2017), whereby the Court held that *American Pipe* tolling cannot apply to override the fixed time limit of the statute of repose in securities class actions.

Third, the opinion below was correctly decided and is fully consistent with the principles underlying both *American Pipe* and *Crown, Cork* and a contrary result would have the illogical and inconsistent consequence of restricting a plaintiff with timely claims from pursuing those claims on behalf of absent class members who also have timely claims.

STATEMENT OF THE CASE

A. Factual Background

China Agritech was a holding company incorporated in Delaware with its principal place of business in Beijing, China. The company claimed to manufacture and sell organic compound fertilizers in China. In a

2009 filing with the U.S. Securities and Exchange Commission ("SEC"), China Agritech reported net revenue of $76 million, which was triple the $25 million in revenue it reported for 2005. On February 3, 2011, LM Research, a market research company, published a report entitled "China Agritech: A Scam" (the "LM Report"). The LM Report asserted that China Agritech was "not a currently functioning business that [was] manufacturing products," but instead was "simply a vehicle for transferring shareholder wealth from outside investors into the pockets of the founders and inside management." Alleging idle factories, minimal investments, and fictitious contracts, the report concluded that China Agritech had "grossly inflated its revenue, failed to account for tens of millions of investor dollars, and [had] virtually no product in the market." Upon release of the LM Report, China Agritech's shares declined precipitously.

After China Agritech denied the allegations detailed in the LM Report, an investor responded by publishing an article sarcastically titled, "China Agritech: China's amazing productivity levels" (the "BC Article"). The BC Article contended that photos released by China Agritech did not show even the most basic equipment required for operations of the magnitude that China Agritech claimed. China Agritech's stock value declined once again in response to the BC Article.

China Agritech subsequently announced the formation of a Special Committee of its Board of Directors to investigate the serious and mounting allegations of fraud. The next day, China Agritech dismissed its independent auditor, Ernst & Young Hua Ming ("E&Y"), and publicly disclosed that E&Y had

earlier insisted that the board commence an investigation into previously identified accounting irregularities. NASDAQ halted trading in China Agritech stock and initiated delisting proceedings and the SEC subsequently issued an enforcement order revoking the registration of China Agritech stock.

B. Initial Class Actions

On February 11, 2011, eight days after the LM Report first questioned the veracity of China Agritech's operations and financial reports, Theodore Dean ("Dean") filed a class action complaint against China Agritech and other defendants on behalf of all China Agritech investors. *See Dean v. China Agritech, Inc.*, Case No. 2:11-cv-1331-RGK (C.D. Cal.) (the "*Dean* Action"). Several movants sought appointment as lead plaintiff, but the district court denied each of the motions despite the mandatory appointment of a lead plaintiff pursuant to the Private Securities Litigation Reform Act amendments to the Exchange Act. See 15 U.S.C. § 78u-4. After sustaining the complaint over a motion to dismiss, the district court in the *Dean* Action denied the plaintiffs' motion for class certification. The district court concluded that although the *Dean* Action plaintiffs had satisfied all four requirements of Rule 23(a), they had failed to establish the predominance requirement of Rule 23(b)(3). The failure to establish predominance was a plaintiff-specific failure in an expert report rather than an incurable classwide defect. The *Dean* Action subsequently settled on an individual basis.

On October 4, 2012, three weeks after the *Dean* Action settled, Kevin Smyth (represented by the same counsel as in the *Dean* Action) filed an almost identical

class-action complaint on behalf of the same would-be class against China Agritech. *See Smyth v. Chang*, Case No. 2:13-cv-3008-RGK (C.D. Cal.) (the "*Smyth* Action"). The district court once again declined to follow the requirements of the Exchange Act by failing to appoint a lead plaintiff. After denying the motion to dismiss the *Smyth* Action, the district court denied the plaintiffs' motion for class certification because the *Smyth* Action plaintiffs were individually unable to meet the adequacy and typicality requirements of Rule 23(a). The failure to meet the Rule 23(a) requirements was, once again, plaintiff-specific rather than an incurable classwide defect. Respondent China Agritech also argued that the district court should strike plaintiffs' class allegations in the *Smyth* Action because the district court had already engaged in a rigorous class-certification analysis in the *Dean* Action and, consequently, there was nothing more the plaintiffs could submit to cure the supposedly "fatal" defects in the prior plaintiffs' class allegations. Squarely rejecting this argument, the district court observed that principles of comity did not mandate the denial of class certification in the *Smyth* Action based on the denial of class certification in the *Dean* Action because, *inter alia*, the *Dean* Action class certification denial was based on a plaintiff-specific infirmity. The *Smyth* Action also subsequently settled on an individual basis.

C. Respondents' Action and District Court Ruling

On June 30, 2014, Michael Resh (represented by different counsel from counsel in the *Dean* and *Smyth* Actions) filed a class action against China Agritech and several individual defendants alleging the same claims

set forth in the *Dean* and *Smyth* Actions (the "*Resh* Action"). The district court once again declined to follow the requirements of the Exchange Act by failing to appoint a lead plaintiff. The Respondents, including Resh, filed an amended complaint shortly thereafter.

Petitioner subsequently moved to dismiss the *Resh* Action in its entirety or, in the alternative, to strike the *Resh* Action's class allegations. The district court granted China Agritech's motion to dismiss the *Resh* Action – in its entirety – as untimely based on it being styled as a class action complaint. Although both the Petitioner and the district court acknowledged that the Respondents' Exchange Act claims were timely as a consequence of *American Pipe* tolling – indeed, the district court *invited* Respondents to file a new individual action alleging the exact same claims so long as the claims were not alleged on behalf of a class under Rule 23 – the district court nevertheless dismissed the action because it believed that the statute of limitations was not tolled for Respondents' would-be class action. In the view of the district court, a contrary ruling "would allow tolling to extend indefinitely as class action plaintiffs repeatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence." Pet. App. 9a.

D. Ninth Circuit Reversal

The Ninth Circuit reversed the district court's order dismissing the *Resh* Action as untimely. The Ninth Circuit began its analysis with this Court's rulings in *American Pipe* and *Crown, Cork*. Noting that the *American Pipe* tolling rule was adopted to "promote economy in litigation" and that 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" (Pet. App. 13a), the Ninth Circuit explained that "once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.*

Under *American Pipe* and *Crown, Cork*, the Ninth Circuit explained that "it is clear that the individual claims of the would-be class members in the *Resh* Action have been tolled during the pendency of earlier class actions." Pet. App. 14a. As a consequence of that tolling, the Respondents were entitled to "bring entirely new individual suits [. . .] either separately *or jointly*." *Id*. (Emphasis added). In fact, the court below explained that its holding was entirely consistent with its earlier ruling in *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (*en banc*). Specifically, Judge Fletcher – writing in the decision below and recounting the *en banc* decision that he had also authored 20 years earlier – reiterated that whether plaintiffs should be permitted to aggregate claims in a subsequent class action is not a statute of limitations question at all, but rather, depends on the operation of preclusion and preclusion-related principles. Pet. App. 15a – 16a.

The Ninth Circuit also explained that its holdings in both *Catholic Services* and the case below were fully consistent with this Court's recent decisions in *Shady Grove* and *Smith v. Bayer*. *Shady Grove*, the court explained, holds that under Rule 23, a plaintiff with a

valid claim may maintain her case as a class action if the terms of the Rule are satisfied; thus, if the individual class representatives' claims were timely as a result of *American Pipe* tolling, their case may proceed as a class action *if* the Rule 23 class action prerequisites are satisfied. In short, *Shady Grove* "rejected an argument [. . .] that only certain categories of claims are eligible for class treatment under Rule 23." Pet. App. 17a. Moreover, any holding that a previous denial of class certification would bar a new class representative with a timely claim from seeking to represent other plaintiffs whose individual claims have the benefit of *American Pipe* tolling would be inconsistent with *Smith v. Bayer*'s holding that decisions rejecting class certification are not binding on class members who are not named plaintiffs.

The Ninth Circuit panel unanimously denied Petitioner's petition for rehearing and for rehearing *en banc*. The full Ninth Circuit was advised of the petition for *en banc* rehearing, and no judge of the court requested a vote on the petition. The petition for a writ of certiorari followed.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among the Courts of Appeals

A. *Shady Grove* and *Smith v. Bayer*

In *Shady Grove*, this Court ruled that plaintiffs who can pursue their claims individually in the federal courts *must* be permitted to pursue their claims together as a class action, as long as they can satisfy the requirements of Rule 23. *Shady Grove,* 559 U.S. at 398. As this Court held, Rule 23 "creates a categorical

rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," and "provides a one-size-fits-all formula for deciding the class-action question." *Id*. at 398-99. In reaching this decision, the Court rejected a New York statute that authorized the award of punitive damages, but only if those invoking the statute refrained from aggregating their claims in the pursuit of a class action. Writing for a Court that was unanimous on this question, Justice Scalia explained that while the state statute may have been prompted by sound policy, it could not impede access to class certification, nor could it override Rule 23's clear text. *Id*. at 403.

In *Smith v. Bayer Corp.*, this Court held that the denial of class certification in one case *does not* preclude members of a failed putative class from pursuing the same claims in a separate class action. In addition, the Court rejected the argument that allowing absent members of a failed class action to pursue their claims in another class proceeding would constitute an abuse of the class action device. Instead, the Court *unanimously* held that the denial of class certification in one case *does not* preclude absent members of the failed putative class from pursuing the same claims in a separate class action. *Smith*, 564 U.S. at 307-08. The Court acknowledged Bayer's argument that "serial relitigation of class certification" could be unfair to defendants, and that defendants could be "forced in effect to buy litigation peace by settling." *Id.* at 316 (internal quotation marks omitted). The Court responded that district courts should simply "apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 317.

B. Unanimous Application of *Shady Grove* and *Smith v. Bayer*

Every Court of Appeals to consider whether *American Pipe* tolling applies to subsequent class actions in the same way as it does to subsequent individual actions within the statute of limitations period in light of *Shady Grove* and *Smith v. Bayer* has answered the question affirmatively.

In *Sawyer v. Atlas Heating and Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011), the Seventh Circuit explained that "[t]olling lasts from the day a class claim is asserted until the day the suit is conclusively not a class action—which may be because the judge rules adversely to the plaintiff, or because the plaintiff reads the handwriting on the wall and decides not to throw good money after bad." In *Sawyer*, defendants argued that plaintiffs' class action was barred by the statute of limitations, but the district court denied the motion, holding that the limitations period was tolled during the pendency of a prior class action. The Seventh Circuit affirmed. Writing for a unanimous panel, Judge Easterbrook rejected the view that "Rule 23 must be set aside when a suit's timeliness depends on a tolling rule" as it "cannot be reconciled with the Supreme Court's . . . decision in *Shady Grove Orthopedic Associates*, which holds that Rule 23 applies to *all* federal civil suits, even if that prevents achieving some other objective that a court thinks valuable." *Id*. at 564.

In *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015), with respect to tolling, the Sixth Circuit cited and followed the Seventh Circuit's decision in *Sawyer*. *Id.* at 652. Like the Seventh Circuit before it

and the Ninth Circuit after it, the Sixth Circuit held that "subsequent class actions timely filed under *American Pipe* are not barred. Courts may be required to decide whether a follow-on class action or particular issues raised within it are precluded by earlier litigation, but we would eviscerate Rule 23 if we were to approve [a rule that . . .] bars *all* follow-on class actions." *Id.* at 652. With respect to preclusion, the court relied on *Smith v. Bayer*. Wal-Mart, like Bayer, argued that allowing repeated litigation of class action certification questions by different named plaintiffs would force defendants "to settle to buy peace." *Id.* at 653. The court responded that Wal-Mart's concerns "need not bar legitimate class action lawsuits or distort the purposes of *American Pipe* tolling. Instead, we follow the Supreme Court's lead and trust that existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of addressing these concerns." *Id.*

The Ninth Circuit cited *Sawyer* and *Phipps* and ruled as each of the other Courts of Appeals have done when considering the same question in light of *Shady Grove* and *Smith v. Bayer*: "[w]e conclude that plaintiffs' class action complaint is not time-barred. Plaintiffs' individual claims were tolled under *American Pipe* and *Crown, Cork & Seal* during the pendency of the *Dean* and *Smyth* Actions. So long as they can satisfy the criteria of Rule 23, and can persuade the district court that comity or preclusion principles do not bar their action, they are entitled to bring their timely individual claims as named plaintiffs in a would-be class action." Pet. App. 22a.

No Court of Appeals that has considered this Court's holdings in *Shady Grove* and *Smith v. Bayer* has held that *American Pipe* tolling does not apply to subsequent class actions as it does to individual actions. Consequently, there is no conflict among the Courts of Appeals and this Court need not resolve any circuit split in authority until such time as any Court of Appeals rules differently than the Sixth, Seventh and Ninth Circuits have already done. Even if there were any doubt as to the proper application of *Shady Grove* and *Smith v. Bayer* here, this Court would benefit from allowing the issue to percolate further and obtaining the considered views of other Courts of Appeals on the subject before addressing the issue. Indeed, until *any* federal appellate court has reached a different conclusion, there is no need for this Court to review the Ninth Circuit's decision.[2]

C. Numerous Courts of Appeals Opinions Predating *Shady Grove* and *Smith v. Bayer* Also Permit Tolling

Several Courts of Appeals that considered the issue before *Shady Grove* and *Smith v. Bayer* also recognized

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[2] In *Odle v. Flores*, 683 F. App'x 288 (5th Cir. 2017), although the Fifth Circuit vacated the district court's order denying intervention and remanded for further proceedings, it observed as follows: "On appeal, the would-be intervenors have argued that the district court previously erred by dismissing the original plaintiffs' class claims as untimely based on its determination that equitable tolling of the statute of limitations under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), is improper in a subsequent class action." *Id.* at 289. The Fifth Circuit declined to answer the question, however, while the would-be intervenors' status is considered by the district court.

tolling for subsequent class actions. For example, in *Yang v. Odom*, 392 F.3d 97 (3d Cir. 2004), the Third Circuit held that tolling applied to a subsequent class action where the earlier denial of class certification was based on the lack of an adequate representative. *Id*. at 108. Indeed, the Third Circuit expressly rejected the position that Petitioner advances here: "it would be at odds with the policy undergirding the class action device, as stated by the Supreme Court, to deny plaintiffs the benefit of tolling, and thus the class action mechanism, when no defect in the class itself has been shown." *Id*. at 106. Although the Third Circuit has not considered the issue in light of *Shady Grove* and *Smith v. Bayer*, in *Leyse v. Bank of Am., Nat'l Assoc.*, 538 Fed. App'x 156, 161 (3rd Cir. 2013), the Third Circuit cited the Seventh Circuit's *Sawyer* decision with approval.

In *Catholic Services* (en banc), the Ninth Circuit allowed tolling for a subsequent class action and observed that "this is not a statute of limitations question at all. It is, rather, a question of whether plaintiffs whose individual actions are not barred may be permitted to use a class action to litigate those actions." *Catholic Services*, 232 F.3d at 1147. The Eighth Circuit also recognizes tolling in certain situations: "Whether the *American Pipe* rule applies to subsequent class actions [thus] depends on the reasons for the denial of certification of the predecessor action." *Great Plains Trust Co. v. Union Pac. R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007).

II. The Decision Below Does Not Permit "Endless Relitigation" of Class Certification Determinations

A. Principles of Comity and Stare Decisis Prevent Endless Relitigation of Class Certification Determinations

Petitioners assert that "the Ninth Circuit joined the Sixth and Seventh Circuits in adopting a rule that would extend the statute of limitations for class actions *indefinitely*" and "permit *endless relitigation* of class certification determinations." Pet. at 3, 15 (emphasis added). That argument echoes the outdated reasoning of the minority of Courts of Appeals that, in decades-old rulings predating *Shady Grove* and *Smith v. Bayer*, rejected *American Pipe* tolling for subsequent class actions. *See Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998) (concern that contrary ruling 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"); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) (contrary ruling would "afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints"); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) ("[t]he 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."); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985) (concern that "putative class

members may piggyback one class action onto another and thus toll the statute of limitations indefinitely").[3]

But the argument that the decision below creates a rule that extends the statute of limitations for class actions indefinitely and permits endless relitigation of class certification determinations is without merit for the straightforward reasons given by the Sixth and Ninth Circuits based on this Court's *Smith v. Bayer* opinion. In short, "ordinary principles of preclusion and comity will further reduce incentives to re-litigate frivolous or already dismissed class claims, and will provide a ready basis for successor federal district courts to deny class action certification." Pet. App. 22a.

Petitioner responds that the Ninth Circuit's reliance on *Smith v. Bayer* and the observation that district courts need only apply comity when facing subsequent class certification motions is faulty because comity is "as vague as it is rare." Pet. at 26. But Petitioner took

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[3] The Eleventh Circuit did not address either *Shady Grove* or *Smith v. Bayer* in *Ewing Industries Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324 (11th Cir. 2015), and the plaintiffs in that case did not make the argument. Rather, the court merely considered its earlier opinion in *Griffin* controlling, and observed that an Eleventh Circuit "panel cannot overrule a prior panel's holding." *Id.* at 1328. The issue was fully briefed in light of *Shady Grove* and *Smith* in a subsequent matter before the Eleventh Circuit in *Love v. Wal-Mart Stores, Inc.*, 865 F.3d 1322 (11th Cir. 2017), but the court dismissed the appeal for lack of jurisdiction and did not reach the question. The district court in that case had observed that "the rationale for the no-piggybacking rule is certainly undermined by the Supreme Court's rulings" in *Smith v. Bayer* and *Shady Grove*. *Love v. Wal-Mart Stores, Inc.*, No. 12-61959-CIV-SCOLA, 2013 U.S. Dist. LEXIS 143234, at *12 (S.D. Fla. Sep. 23, 2013).

this very approach when it argued for denial of the class certification motion in the later-filed *Smyth* Action based on the district court's denial of the class certification motion in the earlier-filed *Dean* Action. Indeed, Petitioner cited this Court's *Smith v. Bayer* decision in support of the argument that the district court should reject the second proposed class action based on principles of comity and stare decisis. The district court considered the argument, and declined to apply comity or stare decisis to its own prior rulings based on the unique facts of the case. "Given the different factual showings in each case, it would be improper to decide class certification issues based solely on comity [. . .] [I]f Rule 23(b) forms an additional barrier to class certification in this case, it is because the evidence Plaintiffs produced is insufficient to meet their burden under Rule 23(b), not because of principles of comity." *Smyth v. China Agritech, Inc.,* No. CV 13-03008-RGK (PJWx), 2013 U.S. Dist. LEXIS 195196, at *21 (C.D. Cal. Sept. 26, 2013). In short, the district court had no difficulty in applying the principles of *Smith v. Bayer* just as this court and numerous Courts of Appeals have directed. The straightforward application of *Smith v. Bayer*'s comity principle to subsequent class certification motions is neither vague nor rare and Petitioner's argument to the contrary should be rejected.

Indeed, numerous district courts after *Smith v. Bayer* have applied this principle, giving persuasive, though not dispositive, weight to decisions denying certification of identical or very similar classes. *See, e.g., Ott v. Mortgage Inv. Corp.*, 65 F. Supp. 3d 1046 (D. Or. 2014); *Murray v. Sears, Roebuck & Co.*, No. C09-5744CW, 2014 U.S. Dist. LEXIS 18082 (N.D. Cal. Feb.

12, 2014); *Williams v. Winco Foods*, No. CV13-00146 CRB, 2013 U.S. Dist. LEXIS 108928 (N.D. Cal. Aug. 1, 2013). And because it is unlikely that federal courts will disregard a decision denying certification of an identical class, the fear that plaintiffs will waste time and money repeatedly attempting to certify the same uncertifiable class is unjustified. As one court observed, the application of comity principles to reject a second attempt to certify a class "aptly illustrates why future copycat suits would be ill-advised." *Williams*, 2013 U.S. Dist. LEXIS 108928, at *7. "Lawyers must eat, so they generally won't take cases without a reasonable prospect of getting paid." *Moreno v. City of Sacramento,* 534 F.3d 1106, 1111 (9th Cir. 2008).

B. This Court's *ANZ Securities* Decision Likely Also Forecloses Endless Relitigation of Class Certification Determinations

Petitioners would also likely argue that if the district court later denies class certification in this case that any subsequent action would be untimely based on this Court's recent opinion in *California Public Employees' Retirement System v. ANZ Securities Inc*., 137 S. Ct. 2042 (2017). In *ANZ Securities*, this Court considered an investor class action alleging that various defendants violated the Securities Act by making misstatements or omissions in public securities offerings issued by Lehman Brothers prior to the company's well-publicized implosion. California Public Employees' Retirement System ("CalPERS"), which had purchased the securities at issue, was a member of the class action and also subsequently filed its own

individual suit more than three years after the securities had been offered. After the parties to the class action reached a classwide settlement, CalPERS opted out of the class action and sought to proceed with its own individual action. In response, the defendants moved to dismiss CalPERS' suit as untimely in light of the Securities Act's three year statute of repose.

This Court held that the filing of a putative class action alleging violations of the Securities Act of 1933 *does not* toll the statute of repose for an individual plaintiff's claims. The Court affirmed that the Securities Act's three-year statute of repose is *not* subject to *American Pipe* tolling during the pendency of a class action. This Court based its holding on the plain text of the Securities Act itself: "In *no event* shall any action be brought to enforce a liability created under [Section 11] more than three years after the security was offered to the public." *Id.* at 2047 (emphasis added). As a consequence of that plain language, CalPERS' filing of a new complaint more than three years after the relevant securities offering was untimely.

In *ANZ Securities*, this Court contrasted statutes of limitations (which encourage plaintiffs to pursue diligent prosecution of known claims) with statutes of repose (which "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *Id.* at 2049) (internal quotations marks omitted). In this way, the statute of repose reflects a legislative mandate to "give a defendant a complete defense to any suit after a certain period." *Id.* Equitable, judge-made tolling rules, like the one announced in *American Pipe*, cannot

apply to override "fixed limit[s]" set by Congress in statutes of repose — which, like Section 13, reflect a "'legislative decisio[n] that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability.'" *Id*. at 2051 (quoting *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014)). Accordingly, applying *American Pipe* to "permit[] a class action to splinter into individual suits" after expiry of the three-year repose period would controvert the intent behind Section 13. *Id*. at 2053.

ANZ Securities likely renders Petitioner's assertion that the Ninth Circuit's opinion permits endless tolling in Exchange Act cases incorrect as a matter of law. Indeed, the facts of this case illustrate the point. Under the Exchange Act, "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." 28 U.S.C. § 1658(b). As set forth above, in February 2011, the LM Report first asserted that China Agritech was "not a currently functioning business that [was] manufacturing products," but instead was "simply a vehicle for transferring shareholder wealth from outside investors into the pockets of the founders and inside management." Under the Exchange Act's five year statute of repose, no action could be timely filed under the statute of repose after February 2016 (at the latest). And under this Court's *ANZ Securities* decision, Petitioner would likely argue the statute of limitations cannot be tolled past the statute of repose

and, consequently, any relitigation of class certification determination can only extend as long as the statute of repose. Petitioners would, consequently, argue that any action filed after the district court makes a determination on class certification in this case would be untimely and subject to dismissal under *ANZ Securities* and the Exchange Act's five-year statue of repose. Indeed, the Third Circuit has already applied *ANZ Securities* to the Exchange Act's five-year statute of repose. *See North Sound Capital LLC v. Merck & Co.*, No. 16-1364, 2017 U.S. App. LEXIS 14170 (3d Cir. Aug. 2, 2017).

III. The Decision Below Is Correct and Fully Consistent with *American Pipe* and *Crown Cork*

The Ninth Circuit's opinion – like those of the Sixth and Seventh Circuits before it – is fully consistent with the rationale set forth in both *American Pipe* and *Crown, Cork*. Allowing a subsequent class action creates no unfair surprise to defendants because the pendency of a prior class suit has already alerted them "not only [to] the substantive claims being brought against them, but also [to] the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 554–55. Allowing a subsequent action to proceed as a class action, rather than only as an individual action, also promotes economy of litigation by reducing incentives for filing duplicative, protective class actions because "[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." *Crown, Cork & Seal*, 462

U.S. at 350–51. If each unnamed member of a class that is not certified due to a plaintiff-specific defect were barred from ever again proceeding by class action, each class member would have an incentive to multiply litigation by filing protective suits or motions to intervene at the outset of the initial class action suit. The weight of individual filings would strain the federal courts. This is precisely the scenario that "Rule 23 was designed to avoid" in cases where adjudication of claims by class action is a fair and efficient method of resolving a dispute. *American Pipe*, 414 U.S. at 551, 553–54; *Wyser-Pratte Mgt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005) ("The purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification, but are when plaintiffs delay until the certification issue has been decided.")

Here, it is uncontested that *every* putative class member has a timely claim as a consequence of *American Pipe* tolling. It is also uncontested that Respondents' action was timely filed as a consequence of *American Pipe* tolling. The *only* question is whether Respondents' timely claims may be pursued as a class action using the civil procedures set forth in Rule 23. Petitioner would use the statute of limitations as a backdoor means of *denying* litigants with undoubtedly timely claims the ability to use the class action device provided by Rule 23 to pursue timely claims on behalf of all others similarly situated. But that outcome would have the incompatible result of making a plaintiff's and absent class members' substantive rights differ depending on whether they were pursued in a class action or an individual action: a plaintiff in an individual action would have a timely claim, while the

same plaintiff could not assert the same timely claim in a class action. But that would conflict with "the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable." *Brown v. Plata*, 563 U.S. 493, 552 (2011) (Scalia, J., dissenting). A class action thus "leaves the parties' legal rights and duties intact and the rules of decision unchanged"; it can "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights," but "alter only how the claims are processed." *Shady Grove*, 559 U.S. at 408 (plurality opinion). Just as a plaintiff cannot acquire substantive rights that she would not have individually by becoming a member of a class, she cannot lose substantive rights, either. Indeed, if plaintiffs had fewer or lesser substantive claims in a class action than an individual action, Rule 23 would conflict with the Rules Enabling Act's prohibition on rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a); *Shady Grove*, 559 U.S. at 406–09 (plurality opinion); *id*. at 422–25 (Stevens, J., concurring); *id.* at 438 (Ginsburg, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully Submitted,

MATTHEW M. GUINEY
Counsel of Record
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
270 Madison Avenue
New York, New York 10016
212.545.4600
guiney@whafh.com

BETSY C. MANIFOLD
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
750 B Street, Suite 2770
San Diego, California 92101
619.239.4590

DAVID A.P. BROWER
BROWER PIVEN
A Professional Corporation
475 Park Avenue South, 33rd Floor
New York, New York 10016
212.501.9000

Attorneys for Respondents
William Schoenke,
Heroca Holding, B.V., and
Ninella Beheer, B.V.