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

REPLY BRIEF FOR PETITIONER

ABBY F. RUDZIN
ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

JASON ZARROW
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

SETH ARONSON
(Counsel of Record)
saronson@omm.com
WILLIAM K. PAO
BRITTANY ROGERS
MICHELLE C. LEU
O'MELVENY & MYERS LLP
400 South Hope Street
Lost Angeles, Cal. 90071
(213) 430-6000

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The opposition to certiorari only confirms the case for this Court's review.

Respondents do not dispute that the courts of appeals have divided over whether the equitable tolling doctrine announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), applies to subsequent class as opposed to individual actions. Instead, they argue that courts that have previously rejected *American Pipe* tolling for class actions will jettison that rule and adopt the Ninth Circuit's holding below in light of *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). But if anything, those cases *confirm* that *American Pipe* applies only to individual actions. And in any event, there is no reason to speculate—at least two courts of appeals have recently reaffirmed their long-held position rejecting *American Pipe* tolling for class actions.

This decisional conflict requires this Court's resolution. The question presented is important and recurring, and the continued existence of the circuit conflict will lead to obvious and unwarranted forum-shopping opportunities. This case presents an ideal vehicle through which to resolve the conflict. And the decision below is incorrect.

The petition should be granted.

A. The Courts of Appeal Are Divided on the Question Presented

There is a three-way circuit conflict over whether *American Pipe* tolling allows a formerly-absent class

member to bring a new class action beyond the limitations period. The First, Second, Fifth, and Eleventh Circuits categorically reject *American Pipe* tolling for subsequent class actions. Pet. 11–14. The Third and Eighth Circuits reject *American Pipe* tolling when (as here[1]) class certification was denied based on the unsuitability of the suit for class treatment, but allow tolling when the amenability of the suit for class treatment has not yet been determined. Pet. 14–15. And the Sixth, Seventh, and now Ninth Circuits allow *American Pipe* tolling for class actions without exception. Pet. 15–18.

Respondents do not dispute that the courts of appeals disagree over the question presented. Rather, their principal contention is that the courts that have rejected *American Pipe* tolling for class actions will reconsider that rule in light of this Court's decisions in *Shady Grove* and *Smith*. *See* Opp. 9–13. Respondents are mistaken. *Smith reaffirms* that *American Pipe* tolling applies to "a putative member of an uncertified class [to] wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*." 564 U.S. at 313 n.10 (emphasis added). And as the petition explained, and as explained further below, *Shady Grove* has nothing to do with tolling or any other issue relevant to this case. *See* Pet. 29-30; *infra* at 11.

---

[1] Respondents repeatedly contend that the district court denied class certification in both the *Dean* and *Smyth* actions "because of defects specific to the named plaintiffs in those actions." Opp. 1. But the *Dean* class "failed to establish the predominance requirement of Rule 23(b)(3)," Pet. App. 6a—a defect in the class, not the plaintiff.

In support of their assertion that courts of appeals that have refused to extend *American Pipe* to class actions will reverse themselves in light of *Shady Grove* and *Smith*, respondents cite the Sixth, Seventh, and Ninth Circuit decisions that have applied *American Pipe* tolling to class actions after *Shady Grove* and *Smith*. Opp. 11–13 (citing *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015), and Pet. App. 1a–23a). But none of those courts *reversed* prior precedent rejecting *American Pipe* tolling for class actions. In fact, *no* court has changed its view about whether *American Pipe* tolling applies to class actions in light of *Shady Grove* and *Smith*. To the contrary, two courts of appeals have expressly *reaffirmed* their rules after *Shady Grove* and *Smith*, and another one considered for the first time and rejected *American Pipe* tolling for class actions after those decisions came down.

The Eleventh Circuit has twice reaffirmed its rule since *Shady Grove* and *Smith*. In *Ewing Industries Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324 (11th Cir. 2015), the court reaffirmed its prior decision in *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994), concluding that *American Pipe* tolling is inapplicable to class actions. *See* 795 F.3d at 1328. Respondents bury *Ewing* in a footnote, contending that it is irrelevant because plaintiffs there did not rely on this Court's intervening decisions. Opp. 16 n.3. Wrong. The *Ewing* plaintiffs expressly argued that *Griffin* "'cannot be reconciled with the Supreme Court's later decision in *Shady Grove*,'" Brief for Plaintiffs-Appellants, 2014 WL 5299297, at *23-24 (11th Cir. Oct. 8,

2014) (quoting *Sawyer*, 642 F.3d at 564), yet the Eleventh Circuit rejected that argument, *Ewing*, 795 F.3d at 1328. The *Ewing* plaintiffs then petitioned for rehearing en banc, arguing that the Eleventh Circuit should reconsider its rule in light of *Sawyer* and *Phipps* (which themselves incorrectly rely on this Court's recent precedents), Pet. for Reh'g En Banc, No. 14-13842, at 2 (11th Cir. Aug. 21, 2015), but the Eleventh Circuit denied rehearing. Unsurprisingly, that court again held several months ago that "[i]n the Eleventh Circuit … [*American Pipe*] tolling is limited to individual, not class, claims." *Love v. Wal-Mart Stores, Inc.*, 865 F.3d 1322, 1323 (11th Cir. 2017).

The Third Circuit has also adhered, after *Shady Grove* and *Smith*, to its position that *American Pipe* tolling does not apply to class actions so long as the validity of the class has been adjudicated. *See In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 409 n.27 (3d Cir. 2015) ("[T]he 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 … at which point the class member may intervene or file an individual suit."). Respondents do not mention *Community Bank* but argue that a different Third Circuit case, *Leyse v. Bank of America*, 538 F. App'x 156 (3d Cir. 2013), "cited the Seventh Circuit's *Sawyer* decision with approval." Opp. 14. *Leyse* was about whether *American Pipe* tolls the limitations period *for an individual action* during the pendency of a class action that was never presented for certification, 538 F. App'x at 160, and the court cited *Sawyer* for the proposition that it does, *id.* at 161–62. In other words, *Leyse* had nothing to do with—and cited *Sawyer* for a

proposition having nothing to do with—the question presented here.

Finally, the Fourth Circuit held after *Shady Grove* and *Smith* that "*American Pipe/Crown, Cork & Seal* tolling applies when a class action is commenced by the filing of a complaint and tolls an *individual's* statute of limitations, not the statute of limitations for the proposed class." *Angles v. Dollar Tree Stores, Inc.*, 494 F. App'x 326, 331 (4th Cir. 2012). That opinion is unpublished, but it shows that even appellate courts addressing the issue for the first time are not compelled to extend *American Pipe* to class actions after *Shady Grove* and *Smith*.[2]

In short, there is an ongoing, intractable circuit conflict over whether *American Pipe* tolling extends to class actions. Only this Court can resolve the conflict. The petition should be granted.

---

[2] District courts in circuits that have in the past rejected *American Pipe* tolling for subsequent class actions continue to apply that rule after *Shady Grove* and *Smith*. *See*, *e.g.*, *Carden v. Town of Harpersville*, 2017 WL 4180858, at *12 (N.D. Ala. Sept. 21, 2017); *Krise v. SEI/Aaron's, Inc.*, 2017 WL 3608189, at *7 (N.D. Ga. Aug. 22, 2017); *Barkley v. Pizza Hut of Am., Inc.*, 2015 WL 5008468, at *2 (M.D. Fla. Aug. 21, 2015); *Reaves v. Cable One, Inc.*, 2015 WL 12747944, at *4 (N.D. Ala. Mar. 16, 2015); *Cleary v. Am. Capital, Ltd.*, 2014 WL 793984, at *3 (D. Mass. Feb. 28, 2014); *Forde v. Waterman S.S. Corp.*, 2013 WL 5309453, at *5 (S.D.N.Y. Sept. 18, 2013).

B. The Question Presented Is Recurring and Important, and This Case Is an Ideal Vehicle for Resolving It

1. a. Respondents do not dispute that the question presented is oft-recurring. Pet. 19. Nor do they seriously contest that the applicability of statutes of limitations to class actions is an important issue, or that the need to ensure national uniformity is especially crucial in the context of nationwide class actions like this one, where forum shopping opportunities are readily available. Pet. 19–20.

b. Instead, Respondents suggest (Opp. 18–21) that the effect of the decision below will be mitigated by *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), which held that *American Pipe* does not apply even to individual actions when the relevant time bar is a statute of *repose* rather than a statute of *limitations*. In *ANZ*, the Court reaffirmed that *American Pipe* is a form of *equitable* tolling and reasoned that because statutes of repose cannot be equitably tolled, *American Pipe* is inapplicable. *Id.* at 2052–54. But statutes of repose are a "relatively rare" form of time bar, *Dekalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 397 (2d Cir. 2016)—most statutory time limits, such as the antitrust and civil-rights time bars at issue in *American Pipe* and *Crown, Cork*, are statutes of limitations subject to equitable tolling (and thus, when appropriate, to *American Pipe*). The answer to the question presented here therefore will determine the circumstances under which most time limits in the U.S. Code can be equitably tolled in the class action context—a self-evidently important question.

Moreover, *ANZ* is a weak safeguard against re-litigation in any event, as this case demonstrates. Respondents correctly note (Opp. 20) that 28 U.S.C. § 1658(b) contains not only a 2-year statute of limitations but also a 5-year statute of repose that ran in 2016. But despite the existence of that non-tollable repose provision, respondents here seek to press a *third* identical class action, and class counsel would have been able to add several more had this case not been on appeal for three years—all beyond the 2-year limitations period.

c. Respondents also suggest that the question presented is unimportant because the negative consequences of the Ninth Circuit's rule—including the serial re-litigation of class certification—are mitigated by principles of comity and *stare decisis*. Opp. 15–18. Even were this true, it would not be a reason to deny review. After all, the Court granted certiorari in *Smith* to resolve the effect of preclusion on absent class members of an uncertified class even though the adverse consequences of a rule rejecting preclusion could be "mitigate[d]" by "principles of *stare decisis* and comity." 564 U.S. at 317. The question here is not whether some other doctrine might in some circumstances preclude serial re-litigation of class actions—the question is whether statutory time bars Congress enacted for precisely that purpose will be given effect.

That question is crucially important. Statutes of limitations are "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 Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam) (internal quotation marks omitted).

These time limits sometimes yield to equity, but equitable tolling rules "are very limited in character, and are to be admitted with great caution." *Gabelli v. SEC*, 568 U.S. 442, 454 (2013) (internal quotation marks omitted). Ignoring statutes of limitations and instead applying nebulous, discretionary doctrines like "comity" is the opposite of the "evenhanded administration of the law," *Baldwin Cty.*, 466 U.S. at 152—it allows precisely the type of unfettered discretion that statutes of limitations are enacted to preclude.

In any event, neither comity nor *stare decisis* is likely to impose any real limit on stacked class actions. Comity is a "weak" bulwark against re-litigation, requiring only that a court "pay respectful attention to the decision of another judge in a materially identical case, but not more than that even if it is a judge of the same court or a judge of a different court within the same judiciary." *Smentek v. Dart*, 683 F.3d 373, 377 (7th Cir. 2012). And *stare decisis* is even worse. That doctrine applies to compel lower courts to "strictly follow the decisions handed down by higher courts," *Black's Law Dictionary* 1626 (10th ed. 2014), meaning it cannot bar re-litigation unless an appellate court has already weighed in. Even then, it only applies to lower courts within the "same jurisdiction." *Id.* Resort to *stare decisis* thus perversely incentivizes class counsel to decline to appeal adverse certification decisions and instead try their hand in other districts and circuits—a particularly egregious form of class-action forum shopping. Pet. 20.

This case demonstrates the point. After Judge Klausner (the district judge below) denied class certification in the *Dean* action on predominance grounds,

a different plaintiff (Smyth) attempted to forum shop by filing "an almost identical class-action complaint on behalf of the same would be class against China Agritech in federal District Court for the District of Delaware." Pet. App. 7a. The Delaware court transferred the case back to the district court below under 28 U.S.C. § 1404(a), but when the case was reassigned to Judge Klausner, he *rejected* petitioner's argument that the case should be dismissed as a matter of comity, *see* Opp. 17. This history confirms that comity and *stare decisis* simply do not preclude re-litigation of class certification, and certainly do not impose strict, across-the-board time limits of the sort Congress envisions in adopting statutes of limitations.

2. This case is also an ideal vehicle through which to resolve the question presented. Pet. 20. Respondents do not dispute that absent *American Pipe* tolling, their class action would be time-barred, so the question presented is outcome-determinative. *Id.* They do argue that under *ANZ*, a different, currently absent class member will not likely be allowed to bring a *fourth* "identical class-action complaint on behalf of the same would-be class," Pet. App. 7a, because of the 5-year statute of repose in § 1658(b). Opp. 20–21. That is true, but whether *this* class action is timely turns entirely on the answer to the question presented, rendering this petition the perfect vehicle for resolving it.

C. The Decision Below Is Incorrect

Respondents also defend the decision below on the merits. Opp. 21–23. Even if respondents were right, that would be no basis to deny certiorari. In any event, respondents' defense of the decision below fails.

American Pipe is a doctrine of "equitable tolling," *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990), which applies only where the plaintiff has exercised "diligence" to protect her rights and some obstacle prevented timely filing, *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016). *American Pipe* held that this standard is satisfied for only absent class members who first rely on the class mechanism and then take action to assert their rights. Pet. 23–24. Here, the only claims that are tolled under *American Pipe* are those belonging to the named plaintiffs, i.e., the only previously-absent class members who have now come to court. But applying *American Pipe* to *class* actions means tolling the statute of limitations not just for formerly-absent members who take action to enforce their own rights, but also for absent class members *who continue to remain absent* and thus have not exercised the diligence equity requires. Pet. 24–27; *see also American Pipe*, 414 U.S. at 561 (Blackmun, J., concurring) (*American Pipe* "must not be regarded" as a way to "save members of the purported class who have slept on their rights"). Because there are no absent class members with timely claims, there can be no certification of a class and thus no class action.

Respondents' contrary position is based entirely on their premise that "*every* putative class member has a timely claim as a consequence of *American Pipe* tolling." Opp. 22. According to respondents, because *American Pipe* tolls the limitations period for all individual class members' claims, and because *Shady Grove* holds that individual claims can be aggregated so long as Rule 23's preconditions are satisfied, respondents *must* be allowed to maintain a class action

so long as Rule 23's other requirements are met. Opp. 22–23. The problem for respondents, of course, is that *American Pipe* does *not* toll the limitations period for every class member: Class members *who seek to assert their rights* (like the named plaintiffs here) can seek the benefit of equitable tolling, but neither *American Pipe* nor any other plausible principle of equitable tolling would apply to absent class members who continue to sleep on their rights. The petition explains this point at length, *see* Pet. 24–28, yet respondents do not even attempt a response.

Respondents' remaining arguments are equally unpersuasive. They argue that the decision below is consistent with *American Pipe* because there is "no unfair surprise" to petitioner in being faced with yet another class action. Opp. 21. The absence of unfair surprise, however, is not a sufficient condition for tolling, but rather a policy rationale that supports tolling where its elements are *otherwise satisfied*. *See Menominee*, 136 S. Ct. at 757 n.5 ("[A]bsence of prejudice ... is not an independent basis for invoking [tolling]." (internal quotation marks omitted)). Respondents also contend that the Ninth Circuits' rule is needed to prevent "duplicative, protective class actions," Opp. 21, but as the petition explained, the U.S. Code and Federal Rules already provide established procedures for managing the existence of multiple class plaintiffs and class actions. *See* Pet. 24–25. There is no basis for ignoring statutorily prescribed time limitations to solve a problem that does not exist.

The decision below is wrong. This Court should grant review and reverse.

CONCLUSION

The petition should be granted.

Respectfully submitted,

ABBY F. RUDZIN
ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

JASON ZARROW
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

SETH ARONSON
(Counsel of Record)
saronson@omm.com
WILLIAM K. PAO
BRITTANY ROGERS
MICHELLE C. LEU
O'MELVENY & MYERS LLP
400 South Hope Street
Lost Angeles, Cal. 90071
(213) 430-6000

Attorneys for Petitioner