No. 17-432

IN THE
Supreme Court of the United States

CHINA AGRITECH, INC.,
Petitioner,

v.

MICHAEL RESH, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, RETAIL LITIGATION CENTER, INC., AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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.

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,

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[*] Pursuant to this Court's 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*, their counsel, or their members made a monetary contribution to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3, counsel for *amici curiae* states that counsel for petitioner and respondents have both granted blanket consent to the filing of all *amicus* briefs, and have submitted letters to that effect to the Clerk.

including those brought as class actions. The RLC frequently files *amicus curiae* briefs on behalf of the retail industry.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil-justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus* briefs in cases involving important liability issues.

The members and stakeholders of all three *amici* 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 substantive law. 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. Reversal is warranted.

SUMMARY OF ARGUMENT

In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), this Court held that the filing of a class action automatically suspends, or "tolls," applicable statutes of limitations. Accordingly, "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) (emphasis added).

The majority of circuits have correctly limited *American Pipe* tolling to the period preceding the *first* decision on class certification, rejecting the argument that *successive* class actions can preserve or revive the timeliness of the claims of those former class members who do not come forward after the initial class is rejected. Such "stacked" class actions allow "lawyers seeking to represent a plaintiff class [to] extend the statute of limitations almost indefinitely," simply cycling in new named plaintiffs "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).

Two courts of appeals—the Ninth Circuit in the decision below, and the Sixth Circuit in a decision followed by the court below—have recently abandoned the majority "anti-stacking" rule and held that limitations periods applicable to the claims of absent persons can be tolled again, and again, and again—as long as lawyers keep filing putative class actions. *See* Pet. App. 11a-23a; *Phipps* v. *Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015).

Amici respectfully submit that the decision below should be reversed for four principal reasons:

I. This Court held last Term that the suspension of limitations periods authorized by *American Pipe* is a form of equitable tolling, not a right granted either by statute or Federal Rule of Civil Procedure 23. *Cal. Pub. Emps.' Ret. Sys.* v. *ANZ Secs., Inc.*, 137 S. Ct. 2042, 2051 (2017). That holding undercuts the reasoning of the Ninth and Sixth Circuit decisions allowing stacked class actions, both of which were premised on the assumption that *American Pipe* tolling was required by Rule 23 itself. Since that premise has already been rejected by this Court, their conclusion cannot stand.

Moreover, equitable tolling is a "rare remedy" (*Wallace* v. *Kato*, 549 U.S. 384, 396 (2007)), available "only" to plaintiffs who have "been pursuing [their] rights diligently" but have nonetheless been "prevented" from "timely filing" by "some extraordinary circumstance." *Menominee Indian Tribe of Wisc.* v. *United States*, 136 S. Ct. 750, 755 (2016) (quotation omitted). These traditional equitable considerations preclude *expanding* the *American Pipe* tolling doctrine to encompass claims asserted on behalf of persons who fail to step forward individually after the first class action is rejected, as this Court's precedents clearly require them to do.

II. *American Pipe* tolling is in considerable tension with the separation-of-powers concerns animating this Court's recent decisions regarding judicial modification of statutory deadlines. As the Court recently explained, 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). It is far from clear where the Court found the authority, in 1974, to adopt a rule suspending statutes of limitations across the board upon the mere

filing of a class action complaint. Even if that rule warrants retention as a matter of *stare decisis*, the Court should not, in 2018, override legislatively enacted timely filing limits for the second, third, or *n*th case filed as a putative class action. The Ninth Circuit (like the Sixth Circuit before it) extended the *American Pipe* doctrine beyond the limits previously given it by this Court, and in so doing those courts invaded the province of the Legislature.

III. The Rules Enabling Act, 28 U.S.C. § 2072, prohibits using Rule 23 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). *American Pipe* tolling, however, makes stale claims timely precisely *because* of claimants' status as absent members of a previous, failed putative class. Claims that would be untimely if asserted individually are made timely simply because they are asserted in a class action. This contradiction comes into even sharper relief when the doctrine is expanded to resuscitate claims in a successive class action, as happened here and in *Phipps*. The Rules Enabling Act squarely prohibits courts from using procedural rules to affect substantive rights in this fashion.

IV. The practical, real-world implications of stacked class actions do not support an extension of *American Pipe* tolling. As the Court recently observed, any supposed benefits from avoiding the need for protective filings by individual class members is "likely . . . overstated." *CalPERS*, 137 S. Ct at 2054. And in any event, no matter how great, such benefits would not provide the courts with "authority to rewrite" statutory deadlines. *Id.* at 2053-54 (quotation omitted). Indeed, stacked class actions burden the

courts and defendants with endless rounds of class-certification briefing, and hamper accurate adjudication by delaying discovery and trial until years and decades beyond the underlying events, when memories and other evidence have long faded. The history of both this case and the Sixth Circuit's *Phipps* case make clear that the same proposed classes will appear over and over again if given the chance. But judicial efficiency is served by finality, not by perpetual litigation.

In summary, an array of intervening precedent makes clear that *American Pipe* would not be decided the same way today. Even if *American Pipe* itself stays on the books, the Court's intervening precedents establish that *expanding* this judicially created tolling doctrine to allow stacked class actions would be incompatible with principles of equity, the Constitution, the Rules Enabling Act, and practical considerations. The decision below should therefore 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. Once class certification fails, the clock resumes running, and former putative class members have the remainder of the original limitations period in which "to file their own suits or to intervene as plaintiffs in the pending action." *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 354 (1983). Or, as the Court recently summarized the rule: If certification is rejected, a would-have-been class member must "file an individual claim or move to intervene in the suit" to pursue

that claim. *Smith* v. *Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011).

The majority of the courts of appeals have long hewed closely to the Court's tolling framework, heeding the warning that the "tolling rule of *American Pipe* is a generous one, inviting abuse." *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring). Specifically, they have held that if a former class member fails to protect his, her, or its individual rights (by filing suit or intervening in a pending action) after certification fails, the limitations period cannot be extended or revived by the filing of another putative class action. *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); *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); *Ewing Indus. Corp.* v. *Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1325 (11th Cir. 2015); *see also Yang* v. *Odom*, 392 F.3d 97, 104 (3d Cir. 2004) (applying bar when certification fails due to defect in class itself); *Great Plains Tr. Co.* v. *Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) (same). Because this approach generally precludes successive (or "stacked") class actions, it has become known as the anti-stacking rule.

The Sixth and Ninth Circuits were long in accord with the anti-stacking rule, but recently abandoned their own prior decisions by ruling that a successive class action *again* tolls the claims ostensibly asserted on behalf of absent persons. *See* Pet. App. 21a-22a (third class action); *Phipps* v. *Wal-Mart Stores, Inc.*, 792 F.3d 637, 652-53 (6th Cir. 2015) (second class action). The question presented in this case is whether this invitation to perpetual litigation can be reconciled

with the principles of law and equity that this Court has made clear apply to judicial adjustments of legislatively enacted timely filing requirements.

These two outlier opinions are based largely on over-reading this Court's decisions in *Shady Grove Orthopedic Associates* v. *Allstate Insurance Co.*, 559 U.S. 393 (2010), and *Smith* v. *Bayer*. But neither case supports the perpetual litigation rule for which they have been invoked. *Shady Grove* says nothing at all about tolling, under *American Pipe* or otherwise. *Smith*'s only mention of tolling is in a footnote clearly stating that the *American Pipe* doctrine allows subsequent *individual* actions. *See* 564 U.S. at 313 n.10. The rest of the case addressed whether a decision rejecting certification of a class has preclusive effect on future actions by unnamed class members; it does not (*see id.* at 318), but that has nothing to do with whether such future claims are *timely*.[1]

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[1] The Seventh Circuit confused matters by casting the question in terms of whether an initial rejection of class certification is *binding* on the absent class members in a subsequent class action, rather than focusing on whether the claims of such individuals are *timely*. *See Sawyer* v. *Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563-64 (7th Cir. 2011). That approach did not survive this Court's decision in *Smith* v. *Bayer*, which squarely held that members of a putative class are not bound by a decision rejecting certification. 564 U.S. at 312-13. The Seventh Circuit has, nonetheless, persisted in conflating preclusion and timeliness, holding that a "denial of class certification [does] not bind" members of a putative class "for whom the statute of limitations has not run." *Collins* v. *Vill. of Palatine, Ill.*, 875 F.3d 839, 846 (7th Cir. 2017). The anti-stacking rule has nothing to do with preclusion, and everything to do with tolling. The background principle is that a statute of limitations begins to run when a claim accrues. *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134

In fact, no precedent of this Court even remotely supports the idea of limitless tolling without regard to Congress's judgments in enacting statutes of limitations. On the contrary, numerous precedents of this Court issued in the decades since *American Pipe* make clear that the expansion of the tolling doctrine undertaken by the court below is untenable under the equitable factors in which *American Pipe* tolling is rooted, the Constitution's separation-of-powers requirements, the Rules Enabling Act, and practical considerations. For any or all of these reasons, the judgment below should be reversed.

I. STACKED CLASS ACTIONS ARE INCOMPATIBLE WITH THE REQUIREMENTS OF EQUITABLE TOLLING

Last Term, the Court made clear that *American Pipe* tolling is "grounded in the traditional equitable powers of the judiciary," rather than "mandated by the text of a statute or federal rule." *Cal. Pub. Emps.' Ret. Sys.* v. *ANZ Secs., Inc.*, 137 S. Ct. 2042, 2052 (2017). "[N]or could it" be otherwise—"Rule 23 does not so much as mention the extension or suspension of statutory time bars." *Ibid*.

S. Ct. 1962, 1967 (2014). The *American Pipe* doctrine "suspends" the running of statutes of limitations (*American Pipe*, 414 U.S. at 554), but only until the class certification decision has been made. *Id.* at 561. If the class is not certified, then the limitations periods begin running again—as *American Pipe* itself held (*ibid.*), and *Crown Cork* reiterated (462 U.S. at 354). The question in this case is whether the filing of a subsequent class action suspends the limitations period *again*. The answer to that question turns on courts' authority to override legislative determinations regarding timely filing, not on whether any person is precluded or bound by any previous ruling on class certification.

CalPERS thus precludes the theory that Rule 23, as interpreted in *Shady Grove*, somehow creates a right to stacked class actions. *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"). To be sure, *Shady Grove* says that Rule 23 governs all cases filed as class actions in federal court. 559 U.S. at 399-400. But any reliance on that proposition to justify stacked class actions did not survive *CalPERS*'s clarification that *American Pipe* tolling is equitable, and not a function of Rule 23. *See* 137 S. Ct. at 2052. Since *American Pipe* tolling is not required by Rule 23, the fact that Rule 23 governs class action procedure in federal cases does not justify the extension of the *American Pipe* tolling doctrine to subsequent class actions.

The reiteration in *CalPERS* that *American Pipe* tolling is equitable also lays bare the tension between the "automatic" tolling initially afforded absent class members and the Court's sharp limits on equitable modification of statutory deadlines. As originally articulated by the Court, *American Pipe* tolling is uncommon, if not unique, among modern equitable tolling doctrines because it applies *automatically* upon the filing of a class action complaint. *See* 414 U.S. at 551 (acknowledging that tolling is available to "those members of the class who did not rely upon the commencement of the class action" and even those "unaware that such a suit existed").

In the decades since *American Pipe* was decided, the Court has reiterated 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). A plaintiff

is "entitled" to its benefit "*only if*" he "'has been pursuing his rights diligently,'" and "'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*, *e.g.*, *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 & n.17 (2014) (listing infancy, mental disability, and fraudulent concealment as examples of when equitable tolling is justified). Moreover, the prospective litigant "bears the burden of establishing [those] two elements." *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005).

These requirements further what the Court recently reiterated is a "primary purpos[e] of limitations statutes"—"'barring a plaintiff who has slept on his rights.'" *Artis* v. *District of Columbia*, No. 16-460 (Jan. 22, 2018), slip op. at 19 (quoting *American Pipe*, 414 U.S. at 554).

Yet, as *CalPERS* acknowledged, *American Pipe* "did not consider the[se] criteria of the formal doctrine of equitable tolling in any direct manner," requiring no evaluation of "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." 137 S. Ct. at 2052. *American Pipe* is thus a relic of the *ancien regime* in which rules governing civil litigation were announced ad hoc rather than through legislation or the rulemaking process. Those days are long past. *See Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997) ("Federal Rules take effect after an extensive deliberative process involving many reviewers . . . . The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts

are not free to amend a rule outside the process Congress ordered.").

If *American Pipe* arose for the first time today, it is unlikely it would be decided the same way. Accordingly, the continued existence of the *American Pipe* tolling doctrine can best be justified on the basis of *stare decisis*. *Cf. Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411-13 (2014) (declining on *stare decisis* grounds to revisit the presumption of reliance in Rule 10b–5 cases established in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988)). The necessary corollary is that *expanding* the doctrine to allow stacked class actions is unwarranted, as it would be incompatible with the Court's equitable tolling holdings.

Allowing stacked class actions impermissibly provides a second (and third, and fourth) round of tolling for every member of the original failed class. Each time, the claims of absent and unknown persons are deemed still timely simply by virtue of again falling within the scope of another proposed class. But any individual within that group cannot successfully "bea[r] the burden of establishing" the elements needed for equitable relief. *Pace*, 544 U.S. at 418. As a starting point, he cannot successfully carry any burden before a court for the simple reason that he has not appeared at all. Moreover, such a person has *not* "been pursuing his rights diligently." *Menominee Indian Tribe of Wisc.*, 136 S. Ct. at 755. Indeed, he has not done anything at all, during the first class action or since.

Nor is there "some extraordinary circumstance" that "prevent[s]" any absent class member from "timely filing" his own suit (or a motion to intervene) after the first class fails. *Menominee Indian Tribe of Wisc.*, 136 S. Ct. at 755. If he has a viable claim, he

faces no obstacle at all, before, during, or after the first suit. Similarly, a failed class action is "an entirely common state of affairs" occurring hundreds or thousands of times a year. *Wallace*, 549 U.S. at 396; Federal Judicial Center, *Integrated Database: Civil 1988–present* (recording over 48,000 denials of class certification in cases terminated in the last three decades); *see also* Federal Judicial Center, *Impact of the Class Action Fairness Act on the Federal Courts* 17 (2008) (identifying approximately 21,000 class actions filed between July 1, 2001 and June 30, 2007). This is an *ordinary* circumstance, not an "extraordinary" one.

Expanding the tolling doctrine to indefinitely benefit those who repeatedly sit silent would push *American Pipe* well past the breaking point. As Justice Blackmun warned in the original decision, the rule "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). Endorsing the approach below would do exactly that.

II. EXPANSION OF *AMERICAN PIPE* TOLLING RAISES SERIOUS SEPARATION-OF-POWERS CONCERNS

Expanding *American Pipe* tolling would also implicate constitutional concerns by impermissibly allowing the Judiciary "to jettison Congress' judgment on the timeliness of suit" under countless statutes. *Petrella*, 134 S. Ct. at 1967.

Statutory time limits "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). Indeed, as the Court noted

just recently, Congress is entirely capable of enacting tolling provisions when it desires. *See Artis*, No. 16-460, slip op. at 4 (analyzing 28 U.S.C. § 1367(d)); *id.* at 7 n.4 (citing other tolling statutes).[2]

When Congress has exercised its authority to make such judgments, constitutional "separation-of-powers principles" block the courts from appointing themselves to a "legislation-overriding" role. *SCA Hygiene Prods. Aktiebolag* v. *First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (quotation omitted).

Wary of such constitutional incursions, the Court has been clear 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* v. *SEC*, 568 U.S. 442, 454 (2013) (quoting *Amy* v. *Watertown (No. 2)*, 130 U.S. 320, 324 (1889)). In a string of decisions since *American Pipe*, the Court has greatly curtailed the ability of courts to modify legislative timely filing requirements. *See generally* Mark A. Perry & David A. Schnitzer, *Plumbing the Depths of* American Pipe 2-3, Class Action Litig. Rep. (BNA), Aug. 11, 2017, http://bit.ly/2D91hBr.

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[2] Congress has enacted numerous additional provisions "suspending" or "tolling" statutes of limitations, at many different times, and in many different contexts. *See*, *e.g.*, 12 U.S.C. § 1787(b)(5)(F)(i); 12 U.S.C. § 1821(d)(5)(F)(i); 12 U.S.C. § 3419; 12 U.S.C § 4617(b)(5)(F)(i), (8)(E)(i); 12 U.S.C. § 5390(a)(3)(E)(i), (5)(E)(i); 15 U.S.C. § 16(i); 15 U.S.C. § 6606(e)(4); 15 U.S.C. § 6614(c)(3)(C); 18 U.S.C. § 3292; 22 U.S.C. § 1631k(c); 26 U.S.C. § 982(e); 26 U.S.C. § 6213(f)(1); 28 U.S.C. § 1332(d)(11)(D); 28 U.S.C. § 2263(b); 29 U.S.C. § 1854(f); 29 U.S.C. § 1724(d); 42 U.S.C. § 233(p)(3)(A)(ii); 42 U.S.C. § 247d–6e(d)(2); 46 U.S.C. § 53911(d); 46 U.S.C. § 30508(d); 50 U.S.C. § 4000(c); 50 U.S.C. § 4308.

The Court has disclaimed *any* ability to extend the time for filing suit when Congress has established a statute of repose, which reflects "a legislative judgment" to create an "absolute . . . bar on a defendant's temporal liability." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182 (2014) (quotation omitted; alteration original); *see also CalPERS*, 137 S. Ct. at 2055 (declining to expand *American Pipe* tolling to extend statutes of repose); *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991) (holding that equitable tolling is "fundamentally inconsistent with the 1-and-3-year structure" of the limitations period in the Securities Exchange Act).

The Court has also limited judicial interposition of rules to toll statutes of limitations. 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 broad 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 affording a private litigant such relief "does not follow for the Government" given the distinct "context of enforcement actions for civil penalties." *Id.* at 451.

This strictness is not reserved for plaintiffs: On the defense side, the Court has essentially abandoned the doctrine of laches, which historically "help[ed] courts avoid the unfairness that might arise were legal rules to apply strictly to every case no matter how unusual the circumstances." *Petrella*, 134 S. Ct. at 1979 (Breyer, J., dissenting); *see id.* at 1978 (majority op.) (limiting use of laches to only "sufficiently extraordinary" circumstances); *see also SCA Hygiene*

Prods., 137 S. Ct. at 967 (barring laches defense to Patent Act claims).

Again, *American Pipe* itself does not fit easily with these more recent precedents: By adopting a blanket tolling rule for class actions, the Court overrode statutory time limits in a wide swath of cases. The Court in 1974 was more willing to announce such sweeping rules than is the modern Court, and more recent decisions in this area reveal the shaky foundations of the *American Pipe* doctrine.

As a result, tolling should be limited to the first certification decision—as this Court has always understood it, and as the majority of appellate courts have recognized in enforcing the anti-stacking rule. The contrary approach, in which successive class actions also confer tolling benefits, allows "lawyers seeking to represent a plaintiff class [to] extend the statute of limitations almost indefinitely until they find a district court judge who is willing to certify the class." *Yang*, 392 F.3d at 113 (Alito, J., concurring in part and dissenting in part). That expansion of the *American Pipe* doctrine is irreconcilable with the long series of post-*American Pipe* decisions in which the Court has recognized that establishing the time for filing suit is properly the role of Congress, not the courts.

No principle of equity authorizes courts to set aside time-bars to benefit persons who have done nothing to protect their own rights, and any attempt to do so would violate the separation of powers. As the Court has repeatedly recognized in recent decisions, judicial adjustments of timely filing requirements threaten the constitutional separation of powers by arrogating to courts a function already exercised by Congress. The blanket tolling rule of *American Pipe*

already creates considerable tension with constitutional boundaries. *Extending* that rule to authorize stacked class actions by affirming the judgment below would result in impermissible "legislation-overriding." *SCA Hygiene Prods.*, 137 S. Ct. at 960 (quotation omitted).

III. DECISIONS ALLOWING STACKED CLASS ACTIONS CANNOT BE RECONCILED WITH THE RULES ENABLING ACT

In the Sixth and Ninth Circuits, an otherwise untimely claim is made timely purely by function of Rule 23. That cannot be squared with the Rules Enabling Act's "pellucid" directive (*Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016)) that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Indeed, the Court has specifically emphasized the application of this principle to Rule 23, reiterating that the Rules Enabling Act does not permit using procedural rules to "giv[e] 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) (any suggestion that "Rule 23 establish[es] an entitlement to class proceedings" would "likely" run afoul of the Rules Enabling Act).

American Pipe tolling itself treats claimants differently based on their previous status as absent members of a putative class. If the claim was within the scope of someone else's failed attempt to invoke Rule 23, it is timely. Otherwise, the claim is extinguished. That creates considerable tension with the Rules Enabling Act.

But assuming the *American Pipe* doctrine could be reconciled with the Rules Enabling Act, the stacking approach endorsed by the court below is in open violation of the statutory proscription. Whereas *American Pipe* instructs people to file their own claims after the tolling period expires, the stacking approach affords additional tolling to still-absent individuals, who failed or refused to follow this Court's instruction to protect their own rights, solely by virtue of "participating" as unnamed class members in a second or subsequent class action. Their expired claims would be resuscitated, deemed timely, and tolled anew. If the second class is also rejected (as happened below), these same individuals would then be free to be part of a third round of litigation, either as individual litigants or, yet again, as unnamed class members. And so it would continue, *ad infinitum*. No such leeway is ever afforded claimants in individual actions absent extraordinary circumstances, and the Rules Enabling Act prohibits using procedural rules to achieve substantive ends on a blanket basis. *See Deposit Guaranty Nat'l Bank of Jackson, Miss.* 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").

The dispositive inquiry under the Rules Enabling Act 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, and would be barred if asserted in an individual action, yet the Ninth Circuit revivified these claims and allowed them to proceed solely because they are being asserted in a class action. The court below therefore used a procedural rule to modify substantive rights (on both

sides of the "v.")—exactly what the Rules Enabling Act prohibits. This is yet another reason why the decision below should be reversed.

IV. PRACTICAL CONSIDERATIONS SUPPORT FINALITY, NOT STACKED CLASS ACTIONS

The court below suggested that stacked class actions can be justified on the grounds of judicial economy, positing that stacking avoids burdensome protective filings from members of a putative class. *See*, *e.g.*, Pet. App. 13a. That suggestion rests on incorrect premises, both legal and factual.

First, the Court rejected the same argument in *CalPERS*, where it affirmed the Second Circuit's strict approach to the statutes of repose in the securities laws. As it explained, courts simply "lac[k] the authority to rewrite" statutory deadlines in the name of judicial economy. 137 S. Ct. at 2053 (quotation omitted). The same is true here: Even if the anti-stacking rule creates some inefficiencies, that is no reason for this Court to override Congress's determinations regarding the time periods in which suits under federal law must be filed.

Second, the actual burden imposed by theoretical protective filings is minimal, for courts and litigants alike. In *CalPERS*, the Court concluded the entire concept was "likely . . . overstated," finding no evidence of an "influx" in protective filings in the years since the Second Circuit adopted its no-tolling rule in securities class actions. 137 S. Ct. at 2054. Indeed, the Court found that was "not surprising" given the reality that "[m]any individual class members may have no interest in protecting their right to litigate on an individual basis." *Ibid.* In any event, as the Court

explained, it is not "onerous" to ask a potential individual plaintiff to file a "simple motion to intervene or request to be included as a named plaintiff in the class-action complaint." *Ibid.*

Similarly, as *CalPERS* made clear, the judicial system is up to the task of handling any theoretical influx: the courts have "ample means and methods to administer their dockets and to ensure that any additional filings proceed in an orderly fashion." 137 S. Ct. at 2054. Most obviously, the claimant can request, and the court can grant, a stay of an individual claim pending further progress in a related class action, pursuant to the inherent judicial power to "control the disposition of the causes on [the] docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254 (1936); *see*, *e.g.*, *Bargas* v. *Rite Aid Corp.*, No. 2:13-cv-03865, 2014 WL 12538151, at *1 (C.D. Cal. Oct. 21, 2014) (staying "all the related single plaintiff cases until a class certification decision has been issued in related case"). Similarly, parties can postpone initial disclosures (*Manual for Complex Litigation (Fourth)* § 40.21), stay counterclaims (*id.* § 40.53), and otherwise coordinate individual and class actions.

Real world experience shows that the anti-stacking rule is entirely workable. The majority of circuits have been applying the anti-stacking rule for many years, and there is no empirical evidence of an undue number of protective filings or judicial unmanageability. Any parade of horribles that respondents and their allies might hypothesize will be only that—hypothetical.

Third, and most importantly, many practical considerations militate in favor of enforcing statutes of limitations as written.

Under a stacked tolling regime, the litigation may continue "almost indefinitely," with "[t]he lawyers . . . simply fil[ing] 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). The resulting repeated rounds of precertification motions and class certification briefing pose a considerably greater burden on the courts (not to mention the defendants) than processing placeholder protective complaints. *See generally Manual for Complex Litigation (Fourth)* pp. 242-82 (2004) (discussing complexities of precertification case management and certification decisions).

Additionally, proper adjudication becomes increasingly difficult as the events at issue recede into the distant past. Even flawless recordkeeping cannot prevent the loss of witnesses and memories over the course of years, "seriously diminish[ing] the ability of the parties and the factfinder to reconstruct what actually happened." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 632 (2007), *superseded on other grounds by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Moreover, some documents and data inevitably become irretrievable or unavailable. In fact, one of the raisons d'etre for statutes of limitations is to ensure cases are decided before "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers* v. *Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

Title VII employment cases, a common type of class action, aptly illustrate this problem. Managerial intent is often a key issue, but one on which the evidence is particularly prone to "fad[ing] quickly with

time." *Ledbetter*, 550 U.S. at 631. Thus, Congress enacted "carefully prescribed," short deadlines for resolving Title VII claims. *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825-26 (1980). Yet under a stacked class action regime, it could easily be decades before a class is actually certified, or, alternatively, individuals step forward for separate adjudication of their claims.

These concerns are not conjectural. The Ninth Circuit was simply incorrect in asserting that the plaintiffs' bar will not try to stack class actions because they will have "little to gain from repeatedly filing new suits." Pet. App. 22a.

The Sixth Circuit's stacking decision, *Phipps*, illustrates what can happen: The underlying Title VII allegations date back to 1998, and the original action was filed in the Northern District of California in 2001, eventually reaching this Court a decade later, in 2011. *See Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011). After this Court denied certification for, among other things, lack of commonality (*see id*. at 359), the same plaintiffs' counsel filed *Phipps* in the Middle District of Tennessee. Contrary to the Ninth Circuit's unsupported assumption, these lawyers apparently thought they had something to gain from repetitive litigation.

Under the anti-stacking rule, the district court dismissed the claims asserted on behalf of absent persons in *Phipps*, but the Sixth Circuit reversed in 2015. *Phipps*, 792 F.3d at 653. On remand, after extensive discovery, further class certification briefing is scheduled for the spring of this year (2018), *two decades* after the start of the class period. *See* Order, No. 3:12-cv-1009 (M.D. Tenn. Nov. 14, 2017), ECF No. 145. More than six years ago, this Court decertified the na-

tionwide class and thus required former class members to file individual suits to protect their own rights. By disregarding that directive, the Sixth Circuit has subjected the employer to years of litigation, document retention obligations, and depositions—all at significant expense—defending against claims that under *American Pipe* itself are clearly time-barred. Judicial efficiency this is not.

And the inefficiency of allowing stacking would not be limited to Title VII cases (as in *Phipps*) or securities cases (as in this case). Rather, the consequences of affirmance would be felt across the full range of class action cases, as illustrated by the major stacking decisions in the courts of appeals:

Case	**Cause(s) of Action**
Basch v. *Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998)	Age Discrimination in Employment Act
Korwek v. *Hunt*, 827 F.2d 874 (2d Cir. 1987)	Sherman Act; Clayton Act; New York antitrust law; Commodity Exchange Act; common law fraud; Racketeer Influenced and Corrupt Organizations Act (RICO)
Yang v. *Odom*, 392 F.3d 97 (3d Cir. 2004)	Securities Exchange Act of 1934; Securities Act of 1933
Angles v. *Dollar Tree Stores, Inc.*, 494 F. App'x 326 (4th Cir. 2012)	Title VII of the Civil Rights Act of 1964
Salazar-Calderon v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985)	Farm Labor Contractor Registration Act; breach of contract

Case	Cause(s) of Action
Phipps v. *Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015)	Title VII of the Civil Rights Act of 1964
Sawyer v. *Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011)	Telephone Consumer Protection Act
Great Plains Trust Co. v. *Union Pac. R.R. Co.*, 492 F.3d 986 (8th Cir. 2007)	Breach of contract; fraud; unjust enrichment
Resh v. *China Agritech, Inc.*, 857 F.3d 994 (9th Cir. 2017)	Securities Exchange Act of 1934; Securities Act of 1933
Griffin v. *Singletary*, 17 F.3d 356 (11th Cir. 1994)	Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 1983
Ewing Indus. Corp. v. *Bob Wines Nursery, Inc.*, 795 F.3d 1324 (11th Cir. 2015)	Telephone Consumer Protection Act

Fourth, virtually every federal law that is privately enforceable contains a statute of limitations, and in each such provision Congress has made a judgment of when "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers*, 321 U.S. at 349. The Ninth Circuit's approach wipes out those determinations in one broad stroke, leaving the ability of plaintiffs' counsel to recruit a new named plaintiff as the only constraint on unending tolling.

Faced with the prospect of whack-a-mole class actions, some defendants will be forced to settle on a classwide basis even after initially defeating class certification, and even where the claims of unknown persons are obviously untimely. That provides financial

incentives for attorneys to file successive class actions, but is neither lawful nor equitable. Rather, once class certification has been denied or rejected, former members of the proposed class—who have benefited from automatic tolling since the case was filed as a class action—must within the remaining limitations period file their own suits or intervene in a pending suit. This Court has already held that this is the law. *Smith*, 564 U.S. at 313 n.10. The Ninth Circuit's misguided effort to change the law by extending tolling to successive class actions should be rejected out of hand.

* * *

From the outset *American Pipe* tolling was a "generous" rule, "inviting abuse." *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring). Expansion of the doctrine to allow repeated, stacked class actions is unwarranted. The approach approved by the court below fails this Court's stringent requirements for equitable relief from statutory deadlines, impinges on Congress's authority to enact statutes of limitations, violates the Rules Enabling Act, and disserves practical considerations. Reversal is warranted.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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