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 PETITIONER

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QUESTION PRESENTED

Whether the tolling rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), tolls statutes of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period.

PARTIES TO THE PROCEEDING

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

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

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

RULE 29.6 DISCLOSURE

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

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* Charles Law has since been dismissed with prejudice from this action.

** Mr. Resh is now deceased.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES
(continued)

Page(s)

OPINIONS BELOW

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 The district court's opinion granting petitioner's motion to dismiss is unpublished but reported at 2014 WL 12599849 and is reprinted at Pet.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 The district court's opinion denying respondents' motion for reconsideration is unpublished but reported at 2015 WL 12781246 and is reprinted at Pet.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

JURISDICTION

The court of appeals issued its decision on May 24, 2017. Pet. App. 1a. The court denied rehearing on July 3, 2017. Pet. App. 45a. The petition for a writ of certiorari was filed on September 21, 2017, and granted on December 8, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

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

INTRODUCTION

This is the third of three identical putative class actions alleging that petitioner China Agritech, Inc. ("China Ag") violated securities fraud provisions of the Securities Exchange Act of 1934. The first class

was not certified for lack of predominance under Rule 23(b)(3). The second class action failed because the named plaintiffs were found to be inadequate and atypical class representatives under Rule 23(a)(3) and (4).

Respondents—absent members of the first two classes—then filed a third (essentially identical) class action complaint. But the problem for respondents is that they filed their action outside the 2-year statute of limitations applicable to Exchange Act claims. The district court accordingly dismissed their class complaint as time-barred.

Respondents appealed, contending that their action was timely because the statute of limitations was tolled during the pendency of the first two putative class actions under the equitable tolling doctrine recognized in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). Those cases hold that the statute of limitations is tolled during the pendency of a class action to allow absent class members to bring *individual* claims, as this Court's more recent precedents confirm. But plaintiffs argued—and the Ninth Circuit agreed—that the *American Pipe* rule also allows for tolling of otherwise untimely follow-on *class* actions.

The Ninth Circuit's extension of *American Pipe* is incorrect and should be reversed. *American Pipe* and *Crown, Cork* are consistent with the two fundamental elements of equitable tolling—plaintiff diligence and extraordinary circumstances. The Court explained in both cases that absent class members diligently seek to protect their rights when they rely

on a pending class action and assert their own claims if that representative action fails. The Court also recognized that an extraordinary justification existed that warranted tolling, because if the limitations period were not tolled while a putative class action is pending, then individuals would file protective claims and undermine Rule 23's policy of discouraging individual suits when a representative action is pending.

The Ninth Circuit's rule must be rejected because it impermissibly extends equitable tolling when the plaintiffs have not exercised diligence, and in a circumstance where the Rule 23 policies animating *American Pipe* do not apply. Extending *American Pipe* to follow-on class actions means tolling not just the named plaintiff's claims but also the claims of absent class members who remain absent after a putative class action fails—i.e., those absent class members who do not seek to protect their own rights through individual actions once there is no longer a representative action pending. Those class members have by definition slept on their rights and are thus not entitled to equity. And while Rule 23 disfavors widespread individual actions when a representative action is possible, neither that Rule nor any other provision disfavors the filing of more than one *class* action at the outset. To the contrary, Rule 23's preference for adequate class representatives and class counsel encourages all would-be class representatives to come forward early.

Indeed, this securities action is governed by the Private Securities Litigation Reform Act ("PSLRA"), which makes that preference explicit by requiring

class-wide notice at the outset of a suit (rather than after a class is certified) so that the district court can appoint the lead plaintiff and approve plaintiff's selection of counsel. That preference for early action is inconsistent with an equitable tolling rule that rewards potential class representatives who come forward only after other attempts at class-wide adjudication fail and the statute of limitations has run.

The Ninth Circuit's rule is thus inconsistent with basic principles of equitable tolling and with *American Pipe*, which is reason enough to reject it. But it is not the only reason. If ratified by this Court, the court of appeals' extension of *American Pipe* to follow-on class actions would lead to significant negative practical consequences, including most obviously that the Ninth Circuit's rule allows for perpetual stacking of one class action after another. That result would eviscerate the purpose of statutes of limitations, including promoting plaintiff diligence and granting defendants repose, yet even the court of appeals recognized that this was the logical implication of its decision. That court nevertheless adopted its rule because it believed that other doctrines would ameliorate this obvious harm. The Ninth Circuit was wrong, and in any event missed the point. There is no need to rely on other doctrines, because Congress has already chosen its preferred method of precluding repeated litigation of the same claim—i.e., by enacting a strict time limit that can only be extended in the rarest of circumstances. This Court should reject the Ninth Circuit's unprecedented and unwarranted expansion of equitable tolling princi-

ples and give effect to the time limitations that Congress enacted.

The decision below should be reversed.

STATEMENT OF THE CASE

Respondents seek to bring the third of three materially identical class actions, each alleging that China Ag violated the Securities Exchange Act of 1934. Exchange Act claims such as respondents' must be brought within "2 years after the discovery of the facts constituting the violation," 28 U.S.C. § 1658(b), and it is undisputed that respondents' complaint was filed well outside that two-year period.

This Court has long held that statutes of limitations like § 1658(b) serve important congressional purposes—including promoting diligence by plaintiffs, providing repose for defendants, and alleviating the burden on the judicial system of having to adjudicate stale claims—and are thus strictly enforced. *See Gabelli v. SEC*, 568 U.S. 442, 448 (2013). The Court has also recognized, however, that in "extraordinary circumstances," statutes of limitations may be subject to equitable tolling. *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016). Respondents argue here that their class action complaint can proceed despite the statute of limitations based on the equitable tolling doctrine articulated in *American Pipe* and *Crown, Cork*.

American Pipe and *Crown, Cork* held that "plaintiff's timely filing of a defective class action toll[s] the limitations period *as to the individual claims* of purported class members." *Irwin v. Dep't of Veterans*

Affairs, 498 U.S. 89, 96 n.3 (1990) (emphasis added). The question presented here is whether the *American Pipe* rule should be expanded to also toll statutes of limitations to allow previously absent class members to bring *class* actions outside the applicable limitations period. The relevant factual background and procedural history are set forth below.

A. Factual Background

This suit is the last of three identical class actions brought on behalf of purchasers of China Ag common stock alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934.

1. *China Ag Stock*

China Ag manufactured and sold organic fertilizers, distributing its product to farmers in 28 Chinese provinces, as well as neighboring countries. DE 28-3, #405.[1] China Ag's stock was listed on the NASDAQ beginning in 2005. Pet. App. 3a. The company prospered in the years that followed, with reported revenues tripling from $25 million in 2005 to $76 million in 2009. *Id.*

In 2011, however, China Ag became a victim of short-seller attacks fueled by online "exposés." On February 3, 2011, someone calling himself "Lucas McGee" posted a report (the "LM Report") accusing China Ag of a litany of misdeeds—from being a shell company to allegedly overstating its revenue and concealing related-party transactions. Pet. App. 3a,

[1] All citations to "DE" refer to district court docket entries in this action, unless otherwise noted. Relevant pages of those entries are identified by the district court Page ID number.

27a. Another short seller, Bronte Capital, soon joined the assault, alleging that China Ag had grossly overstated the amount of fertilizer it was capable of producing. Pet. App. 3a–4a. The company's stock plummeted in light of these reports and approximately one month later—on March 14, 2011—the NASDAQ halted trading and began delisting proceedings. Pet. App. 4a.

2. *The* Dean *Action*

a. Unsurprisingly, the publicity just described—and the subsequent market reaction—resulted in a slew of private securities litigation. Any Exchange Act claim would have to be brought within "2 years after the discovery of the facts constituting the violation," 28 U.S.C. § 1658(b), but it took Theodore Dean, a China Ag shareholder, only eight days (until February 11, 2011) to file a class action against China Ag and various of its officers and directors alleging claims under both the Exchange Act and § 11 of the Securities Act of 1933. *See Dean v. China Agritech Inc.*, No. 2:11-cv-01331 (C.D. Cal.); Pet. App. 4a–5a.

b. Because Dean sought to lead a federal securities class action, his complaint was subject to the early notice requirements set forth in the PSLRA. That statute requires a securities class action plaintiff to promptly publish a notice alerting potential class members of the pendency of the action, the claims asserted, and the proposed class period and advising that any class member has the right to move the court to serve as lead plaintiff. *See* 15 U.S.C. § 78u–4(a)(3)(A)(i). This early notice is meant to encourage other potential class members who might like to lead the class themselves to come for-

ward to serve as lead plaintiffs early in the litigation, facilitating selection of the best possible lead plaintiffs. *See id*. § 78u–4(a)(3); Fed. R. Civ. P. 23(a), (g); *see also* H.R. Rep. No. 104-369, at 32 (1995) (Conf. Rep.) ("These provisions are intended to encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class.").

On the same day the complaint was filed, Dean's counsel posted the requisite notice through a global media platform called Business Wire, "a widely circulated national business-oriented publication," 15 U.S.C. § 78u-4(a)(3)(A)(i); *see* JA 274-76. A week later, Dean's counsel published a similar notice on GlobeNewswire. JA 277-80.

Nine shareholders responded and sought to be named lead plaintiffs. Pet. App. 5a; *Dean*, No. 2:11-cv-01331, DE 4, #33-34, DE 7, #118. Judge Klausner ruled that he would consider the lead plaintiff issue at the class certification hearing. *See* Pet. App. 5a; *Dean*, No. 2:11-cv-01331, DE 22, #281. Other shareholders who had filed their own class actions later voluntarily dismissed them based on *Dean*'s pendency. *See Calcagno v. China Agritech, Inc.*, No. 2:11-cv-02800 (C.D. Cal.); *Pepperdine v. China Agritech, Inc.*, No. 2:11-cv-01414 (C.D. Cal.).

c. Respondents were not in the group who filed their own class actions or sought to lead the *Dean* action.

Michael Resh (now deceased) was a self-proclaimed "internationally recognized Advisor[] in

the field of Securities Fraud Litigation." DE 28-4, #569. He was the Founder of ReshFitzgerald, a company "committed to monitoring through our investigative team of professional[s] potential securities fraud class actions." *Id*. at #572. His job was to closely track the stock market for potential fraud, so he could alert plaintiffs' lawyers about "the opportunity to represent the shareholder interest and initiate litigation." *Id*.

Resh purchased China Ag stock on February 22, 2011, shortly after the *Dean* notices were posted. DE 24-1, #297. But Resh did not bring an individual action or class action within the limitations period, nor did he seek to join or lead Dean's class action.

So too with respondent Heroca Holding. It evidently was watching China Ag's stock price closely in 2011—purchasing 20,000 shares on February 8 and February 23, selling 10,000 shares on February 25, and then buying 10,000 shares on March 11. *Id*. at #304. CAGC Investor Group, which consists of respondents Heroca Holding, William Schoenke, and Ninella Beheer, claims to have lost nearly half a million dollars. DE 22, #134 n.1, 139. Yet as with Resh, none of these respondents did anything to assert a claim until September 2014, well after the limitations period had run. *See infra* at 13.

d. On June 22, 2011, Dean, with four new named plaintiffs, filed an amended complaint. Pet. App. 5a. That complaint (like the complaint in this action) asserted claims under §§ 10(b) and 20(a) of the Exchange Act. *Id.* It also alleged Securities Act claims. *Id.* The district court dismissed the Securities Act claims on the pleadings, but allowed the Ex-

change Act claims to proceed to discovery. Pet. App. 6a.

On January 6, 2012, after ten months of discovery—including five separate expert reports—the *Dean* plaintiffs moved for class certification. On May 3, 2012, the district court denied the plaintiffs' motion. JA 177-92. The court first concluded that the *Dean* plaintiffs satisfied the requirements of Rule 23(a), including the requirements that they adequately represent the putative class's interests and that their claims be typical of the class's claims. JA 184-86.

But the Exchange Act claims were unsuitable for class treatment, the district court held, because plaintiffs were "unable to establish that questions of law or fact common to class members predominate over any questions affecting only individual members." JA 192 (citing Fed R. Civ. P. 23(b)(3)). That is, reliance could not be proven on a class-wide basis because plaintiffs had not established the prerequisites for a fraud-on-the-market presumption under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). JA 187-92. The district court reached this conclusion because plaintiffs' expert was "unable to establish that [China Ag] stock was traded on an efficient market." JA 192. The *Dean* plaintiffs filed a Rule 23(f) petition, which the Ninth Circuit summarily denied. Pet. App. 6a.

e. After class certification was denied, Dean's counsel published another notice. That notice explicitly informed shareholders—a pool that included respondents—that they needed to take immediate action if they wanted to preserve their claims:

> [T]he Court denied the plaintiffs' motion for class certification. As a result, your rights as a shareholder are no longer protected. *You must act yourself to protect your rights*. You may protect your rights by joining in the current Action as a plaintiff or by filing your own action against China Agritech.

JA 281-82 (emphasis added).

Still, respondents and the absent class members they now purport to represent did nothing. Over the next five months, during which the *Dean* plaintiffs continued litigating their case as individuals, respondents neither intervened nor brought their own action. The *Dean* plaintiffs settled their individual claims in September 2012, resulting in the action's dismissal. Pet. App. 6a.

3. *The* Smyth *Action*

On October 4, 2012, approximately three weeks after the district court's dismissal of the *Dean* action, another set of plaintiffs—represented by the same counsel that filed *Dean*—filed "an almost identical class-action complaint on behalf of the same would-be class against China Agritech." Pet. App. 7a; *see Smyth v. Chang*, No. 2:13-cv-03008 (C.D. Cal.). The *Smyth* plaintiffs originally filed suit in the District of Delaware and, after the required PSLRA notice was posted, eight shareholders sought to be appointed as lead counsel. Pet. App. 7a. Respondents were again not among that group.

Smyth was then transferred to the Central District of California, where it was designated as "relat-

ed" to *Dean* and assigned to Judge Klausner (the same district judge who presided over *Dean*). Pet. App. 7a. On July 18, 2013, the *Smyth* plaintiffs filed an amended complaint adding five named plaintiffs. *Id.*

The *Smyth* plaintiffs then moved to certify the class. China Ag argued that the district court should afford comity to its *Dean* decision. The district court rejected that argument and instead denied class certification based on plaintiffs' failure to satisfy the typicality and adequacy requirements of Rules 23(a)(3) and (a)(4). JA 255-65. The *Smyth* plaintiffs' claims were not typical of the class, the district court held, because their "prior relationship with the *Dean* plaintiffs"—with whom they shared counsel—subjected them to unique defenses. JA 255-60. Nor were they adequate, because there were "troubling, unanswered questions about the extent to which the Rosen Law Firm, rather than its clients, is directing this action." JA 260-62. The district court also denied the plaintiffs' motion to be appointed lead plaintiff. JA 265.

In January 2014 the *Smyth* plaintiffs voluntarily dismissed their suit without prejudice. Pet. App. 8a.

4. *This Action*

On June 30, 2014, respondent Michael Resh filed this proposed class action. That filing came more than 3 years after the LM Report was published. *See* Pet. App. 8a–9a. Resh again published the requisite PSLRA notice, DE 23-1, #155-56, and the case was again assigned to Judge Klausner.

Resh was joined two months later by the remaining respondents, who moved to intervene as lead plaintiffs. DE 22. All of the plaintiffs then filed an amended complaint on September 4, 2014. DE 24. That complaint was "based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions." Pet. App. 8a. No other class members filed suit (either an individual or class action), sought to be appointed as lead plaintiffs, or otherwise showed any interest in this case.

B. Decisions Below

This action was filed well after the applicable two-year statute of limitations had lapsed, but respondents contended that their new purported class action was nevertheless timely because the limitations period had been tolled during the pendency of the *Dean* and *Smyth* class actions under the *American Pipe* rule. China Ag responded that *American Pipe* allowed for tolling of the limitations period only for subsequent individual actions, not subsequent class actions. The district court agreed, but the Ninth Circuit reversed.

1. On December 1, 2014, the district court granted China Ag's motion to dismiss respondents' class-action complaint as untimely. The court noted that respondents did "not dispute that, absent the *Dean* and *Smyth* actions, the statute of limitations would have run by the time they filed their Complaint." Pet. App. 30a. And based on its reading of Ninth Circuit precedent, the district court held that *American Pipe* permitted respondents to bring their individual claims despite the running of the limitations

period, but not another class action. Pet. App. 30a–36a.

Respondents argued that Ninth Circuit tolling law applies "to the class action as long as class certification has not been previously denied on the ground that the claims were not suitable for class treatment." Pet. App. 32a. The district court rejected this reading of Ninth Circuit law, but also held that even if this were the rule, it would not help respondents, because the "Court previously denied certification of this same putative class in the *Dean* action on the ground that the claims were not suitable for class treatment," i.e., because respondents had "failed to establish the 'predominance' requirement of Rule 23(b)(3)." Pet. App. 35a. Respondents pointed to the court's conclusion in *Dean* that a fraud-on-the-market presumption was inappropriate as a flaw in the *Dean* plaintiffs' evidentiary presentation. They therefore "argue[d] that class certification was denied not because the claims were not suitable for class certification, but rather, because the plaintiffs failed to establish that the claims were not suitable for class certification." Pet. App. 36a (emphasis omitted). The district court rejected that attempt to recharacterize the court's predominance-based dismissal as a plaintiff-specific deficiency, "as it 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." *Id.*

Respondents moved for reconsideration, and the district court denied the motion. Pet. App. 44a. The court emphasized that while any class action is time-

barred, respondents were "not prevented from filing a complaint asserting individual, rather than class action, claims . . . if they so choose." Pet. App. 42a (internal quotation marks omitted).

2. Respondents declined to pursue their individual claims, even though they claimed damages of nearly half-a-million dollars. *See* DE 22. They instead appealed, and the court of appeals reversed. The panel held that *American Pipe* tolls the limitations period to allow absent class members to bring not only their own individual claims, but also to bring otherwise untimely class actions—even when the district court previously found an identical class deficient. Pet. App. 15a–17a, 22a.

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

The court further justified its holding by citing "policy objectives" that supposedly supported *American Pipe*'s rule. Pet. App. 21a. According to the Ninth Circuit, *American Pipe* should be extended to subsequent class actions because there is "no unfair

surprise to defendants" in being faced with yet another class action. *Id.* And although the court acknowledged that its rule could allow for limitless class action complaints over time, it concluded that its rule would ultimately promote "economy of litigation" by reducing incentives for protective class filings within the limitations period. *Id.*

Finally, the court of appeals recognized that its rule could invite "abusive filing of repetitive class actions," but asserted that three supposed safeguards were adequate to protect against such abuse. Pet. App. 22a. First, the panel said that self-restraint by the plaintiffs' bar would serve to limit class litigation abuse, hypothesizing that plaintiffs' counsel "will have little to gain from repeatedly filing new suits" where class certification is unlikely and accordingly that those attorneys "at some point will be unwilling to assume the financial risk in bringing successive suits." *Id.* Second, the court asserted that preclusion principles would provide some barrier to serial litigation, *id.*, despite acknowledging that preclusion does not apply to new class actions brought by previously absent members of an uncertified class (such as respondents). *Id.* Third, the panel explained that district courts could reject improper attempts to stack successive class actions by invoking "comity" to prior decisions denying class certification. *Id.*

SUMMARY OF ARGUMENT

I. *American Pipe* tolls the statute of limitations during the pendency of a putative class action for absent class members to file *individual* claims if the class fails. The Ninth Circuit erred in extending

American Pipe to also toll the limitations period for follow-on class actions.

A. Statutes of limitations reflect a congressional judgment about when the need for finality outweighs the interest in protecting potential claims. This Court has long recognized that time bars protect important interests—including promoting plaintiff diligence, avoiding the burden on the judicial system imposed by stale claims, and providing defendants repose—and has thus strictly enforced them.

The Court has also recognized that Congress legislates against the background of equitable tradition, which includes the equitable tolling of limitations periods. But this Court has made clear that the availability of equitable tolling is strictly limited and cannot be extended beyond its historical reach. Particularly relevant here, tolling is precluded unless two elements are satisfied. First, the plaintiff seeking tolling must demonstrate that she acted diligently in protecting her rights. Second, the plaintiff must identify some other "extraordinary circumstance" that justifies tolling.

B. *American Pipe* and *Crown, Cork* announced a specific application of equitable tolling principles in the class action context, holding that statutes of limitations are tolled while a class action is pending to allow absent class members to assert *their own* claims if the class fails, either through intervention (*American Pipe*) or separate individual actions (*Crown, Cork*). These cases recognized an extraordinary justification for tolling: without tolling, plaintiffs who wanted to protect their rights would file protective individual actions while the potential

class is still pending and that would undermine Rule 23's policy of avoiding individual litigation when there is a potential for representative adjudication. In both cases, the Court explained that the beneficiaries of this tolling rule have acted diligently by reasonably relying on a pending class action to represent their rights and then filing individual claims if the class failed.

American Pipe and *Crown, Cork*, by both their explicit terms and their rationale, permit tolling for *individual* actions. Unsurprisingly, this Court has repeatedly recognized that the *American Pipe* rule tolls the limitations period for absent class members to file individual actions and thus protect their own individual rights.

C. The decision below extending *American Pipe* to follow-on class actions cannot be reconciled with fundamental principles of equitable tolling, class actions, and the separation of powers.

1. Plaintiff diligence has always been an absolute prerequisite for equitable tolling. *American Pipe* and *Crown, Cork* applied this principle, holding that absent class members do not sit on their rights when they rely on a pending class action and then file an individual claim if the class action fails. The Ninth Circuit's extension of *American Pipe* to class actions, by contrast, flouts this diligence requirement in two respects.

First, absent class members who do not file their own claims once the class fails and instead continue to remain absent obviously have not exercised any diligence at all. Yet the effect of extending *American*

Pipe to follow-on class actions is to toll the limitations period for every absent class member, none of whom has done anything to assert her own rights once the first class action failed nor otherwise showed any interest in the litigation. This failure of absent-class-member diligence suffices to reject the Ninth Circuit's rule.

Second, lead plaintiffs in a follow-on class action (such as respondents here) also necessarily failed to satisfy the diligence requirement. Tolling is appropriate for absent class members to assert individual claims because when a class action is pending, it is reasonable for an absent class member to rely on that potential class action to protect her rights. But it is plainly *unreasonable* for a class member whose goal is to represent the class to rely on another class representative. And that is especially so in securities litigation covered by the PSLRA, which requires notice to all class members so that any who wants to represent the class can come forward to allow the district court to pick the best lead plaintiffs. Securities-litigation class members like respondents thus have every opportunity and incentive to come forward early to lead the class. A failure to do so demonstrates a lack of diligence and thus precludes tolling.

2. The Ninth Circuit's rule independently fails because the necessary extraordinary circumstances that justified tolling in *American Pipe* do not apply to follow-on class actions.

Tolling was justified for individual claims because a contrary rule would undermine Rule 23 by inviting protective individual litigation while a class

action was still pending. The Ninth Circuit believed that its rule was similarly justified because it would discourage the filing of protective class actions. That is incorrect, because any class member who wants to represent the class already has every incentive to file a class action complaint early. And even if the court of appeals were correct that rejecting tolling would lead to the early filing of additional class actions, neither Rule 23 nor any other federal policy discourages that result. Federal courts are well equipped to handle multiple filings through, for example, consolidation and multi-district litigation procedures. And if anything, the filing of multiple class actions furthers Rule 23's policy of determining early whether class-wide litigation is warranted and identifying adequate representatives and class counsel. Certainly, the PSLRA embodies Congress's affirmative policy of encouraging potential lead plaintiffs to come forward early. If the Ninth Circuit's tolling rule creates the opposite incentive, as that court itself believes, then its decision should be rejected as inconsistent with the PSLRA.

The court of appeals also noted that its tolling rule would not prejudice defendants. But a lack of defendant prejudice can never itself justify tolling. The Ninth Circuit's evaluation of defendant prejudice is also wrong. Unlike with tolling for individual actions, which by its nature does not require costly class discovery and can result only in a limited tolling period, the Ninth Circuit's rule would result in unlimited tolling for one costly class action after the other. And the rule would create incentives for plaintiffs' counsel to file repetitive class actions—

such actions provide plaintiffs' attorneys with a high potential reward while putting tremendous pressure on defendants to settle even meritless claims. The prejudice resulting from this lack of repose is obvious, and it is flatly inconsistent with the policies animating statutes of limitations in the first place.

3. Finally, the Ninth Circuit's rule violates the separation of powers. This Court has long recognized that the doctrine of equitable tolling does not grant courts the general authority to set aside congressional time bars. Rather, equitable tolling is authorized *by Congress* because Congress drafts statutes of limitations against the historical rules governing equity. The Ninth Circuit's extension of *American Pipe* flouts those historical limitations for the reasons explained and thus improperly grants to courts rather than Congress the power to decide when claims are time-barred.

D. The Ninth Circuit's decision, if adopted by this Court, will also lead to significant adverse practical consequences. Most obviously, the Ninth Circuit's rule allows class actions to be stacked indefinitely—precisely the sort of abusive and endless litigation statutes of limitations are meant to preclude. The court of appeals acknowledged that the logic of its rule would lead to serial litigation, but believed that these effects would be mitigated by plaintiff-attorney self-restraint and the doctrines of preclusion and comity. The Ninth Circuit's conclusion is incorrect—none of these supposed impediments would materially ameliorate the harms caused by the court of appeals' rule. More important, even if the Ninth Circuit were right, Congress has already

determined that the appropriate way to cut off abusive litigation is through a statute of limitations, and the court of appeals erred in declining to give effect to that choice.

E. Finally, the Ninth Circuit misconstrued this Court's recent precedent as requiring the result below. Nothing in this Court's recent cases requires or even permits extending *American Pipe* tolling to follow-on class actions.

II. Even if there are circumstances under which *American Pipe* tolling can extend to follow-on class actions, tolling certainly should not apply when certification of the initial class was denied based on a class-wide (as opposed to plaintiff-specific) defect.

A. It would be inequitable to toll the limitations period to allow relitigation of class certification for at least three reasons.

First, tolling in those circumstances would be inconsistent with the premise of *American Pipe*. That decision held that tolling was authorized for individual actions because it was reasonable for absent class members to rely on the class mechanism to protect their rights until the class fails. But it is no longer reasonable for absent class members to continue to rely on a class action to protect their rights if a Court has already determined that class treatment is not permitted by Rule 23. Potential plaintiffs who continue to rely on such a class are necessarily sleeping on their rights and should not benefit from tolling.

Second, extending tolling to class actions when a class has already been found invalid would work a

substantial injustice. Relitigation of the validity of class certification would waste significant resources and would undermine confidence in the judicial system. There is no equity in extending the limitations period to allow for relitigation of already settled questions.

Third, there is no compelling justification for extending *American Pipe* to allow relitigation of the validity of class-wide adjudication. Absent class members who want to bring individual claims are already protected under *American Pipe* and have already received a full and fair opportunity to litigate whether the case may proceed as a class action. No equitable principle authorizes tolling in these circumstances.

B. This rule requires reversal because the *Dean* class action was rejected on predominance grounds—a class-based rather than plaintiff-specific reason for the denial of class certification.

The decision below should be reversed.

ARGUMENT

American Pipe tolls statutes of limitations while a putative class action is pending to allow absent class members to bring their own individual claims if the class fails. That doctrine should not be extended to allow absent class members the benefit of tolling to bring new, otherwise untimely class actions. At the very least, tolling should not be available when (as here) the viability of the class has already been litigated and rejected. The court of appeals' contrary decision should be reversed.

I. EQUITABLE TOLLING UNDER *AMERICAN PIPE* APPLIES ONLY TO PREVIOUSLY ABSENT CLASS MEMBERS' INDIVIDUAL ACTIONS AND SHOULD NOT BE EXTENDED TO OTHERWISE UNTIMELY CLASS ACTIONS.

A. Statutes of Limitations Are Strictly Enforced, Subject Only to Narrow Equitable Tolling Principles.

1. Statutes of limitations reflect Congress's "value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Del. State Coll. v. Ricks*, 449 U.S. 250, 260 (1980) (internal quotation marks omitted). Such statutorily prescribed time periods for bringing suit serve three related interests. First, they "encourage the plaintiff to pursue his rights diligently." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (internal quotation marks and alterations omitted). Second, they "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli*, 568 U.S. at 448 (quoting *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). Third, they ensure "certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities," providing a measure of "repose." *Rotella v. Wood*, 528 U.S. 549, 555 (2000).

For all these reasons, this Court has long recognized that "strict adherence" to congressionally prescribed time limits is 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), and "vital to the welfare of society," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). *Accord Menominee*, 136 S. Ct. at 757; *Gabelli*, 568 U.S. at 448.

2. Congress is also presumed to "legislate[] against a background of common-law adjudicatory principles," including "[e]quitable tolling, a long-established feature of American jurisprudence derived from 'the old chancery rule.'" *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991), and *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)).

This Court has long made clear that the equitable tolling doctrine is not "an unregulated power of administering abstract justice at the expense of well-settled principles." *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 658 (1873). Rather, because Congress is understood to legislate against the background of settled equitable tolling rules, equitable tolling is "fundamentally a question of statutory intent." *Lozano*, 134 S. Ct. at 1232. Thus, courts may not apply equitable tolling rules that "break with historic principles of equity." *Holmberg*, 327 U.S. at 395. And this Court has repeatedly rejected requests to fashion tolling rules that are "completely divorced from long-settled equitable-tolling principles." *Credit Suisse Secs. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012).

As explained in more detail below, these established equitable principles authorize tolling only

when the plaintiff "has been pursuing his rights diligently" *and* when tolling is otherwise justified by "extraordinary circumstances." *Menominee*, 136 S. Ct. at 755 (internal quotation marks omitted); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (equitable tolling can be invoked "only sparingly").

B. *American Pipe* Recognized That Statutes of Limitations Are Equitably Tolled During the Pendency of a Class Action for Subsequent Individual Actions.

1. This case concerns equitable tolling in the class action context. In *American Pipe* and *Crown, Cork*, this Court recognized a specific "equitable tolling" rule applicable to class actions, *Irwin*, 498 U.S. at 96 & n.3, "grounded in the traditional equitable powers of the judiciary," *Cal. Pub. Emps. Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2052 (2017); *accord Young v. United States*, 535 U.S. 43, 49 (2002). Those cases hold that when a class action is timely filed, the statute of limitations must be tolled as a matter of equity for absent class members who subsequently bring their own *individual* claims (either through new complaints or intervention in the pending action) that would otherwise be untimely. *See American Pipe*, 414 U.S. at 554; *Crown, Cork*, 462 U.S. at 354.

In *American Pipe*, the district court had denied certification of a timely filed class action for failure to prove numerosity, and absent class members subsequently sought to intervene in the named plaintiff's individual action after the limitations period had run. 414 U.S. at 543–44. The Court's concern

with dismissing such intervention as time-barred was that if the time to intervene were not tolled during the pendency of a class action, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.* at 553. The Court explained that "allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would" conflict with the policies established in Rule 23: it would result in "needless duplication of [intervention] motions" and "deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Id.* at 553–54. At the same time, this tolling rule gave effect to the equitable requirement of diligence because it would not reward any plaintiff who "has slept on his rights." *Id.* at 554 (internal quotation marks omitted); *see also id.* at 561 (Blackmun, J., concurring) ("Our decision, however, must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights."). Thus, the 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" and who subsequently file a motion to intervene. *Id.* at 554.

Crown, Cork extended this reasoning to absent class members who later brought their own individual actions. The Court explained that just as with intervention, "unless the statute of limitations was

tolled [for individual claims] by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights," and individuals would have to bring their own claims "prior to the running of the statute of limitations . . . to ensure that their rights would not be lost in the event that class certification was denied." 462 U.S. at 350. This would result in "a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351. And the Court again emphasized that the rule would not reward any litigant who failed to exercise diligence: "Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Id.* at 352–53; *see also id.* at 344 (Powell, J., concurring) ("reiterate[ing] the views expressed by Justice BLACKMUN in" *American Pipe* that tolling should not apply to "members of the purported class who have slept on their rights"). Thus, the Court held that a timely filed class action tolls the limitations period "until class certification is denied," at which point "class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.* at 354.

2. *American Pipe* and *Crown, Cork* are by their terms applicable only to *individual* claims of formerly absent class members. The tolling rule announced in those decisions, moreover, is based on a rationale applicable only to individual claims. The decisions authorized tolling only after determining that class

members who delay filing individual claims while a class action is pending "cannot be accused of sleeping on their rights," because Rule 23 "encourages class members to rely on the named plaintiffs to press *their claims*," *id.* at 352–53 (emphasis added)—i.e., absent class members' individual claims. That is why *Crown, Cork* explained that under the *American Pipe* rule, tolling applies "until class certification is denied," at which point "class members may choose to file *their own suits* or *to intervene as plaintiffs* in the pending action." *Id.* at 354 (emphasis added). Moreover, the principal reason for tolling the limitations period during the pendency of a class action is to prevent *individuals* from intervening or filing their own claims even though the class action represents their interests—a result that would conflict directly with Rule 23's policy favoring efficient representative litigation. *See American Pipe*, 414 U.S. at 553; *Crown, Cork*, 462 U.S. at 351.

It is not surprising, then, that this Court has consistently and without exception "described *American Pipe* as creating a tolling rule, necessary to permit the ensuing *individual actions* to proceed." *ANZ Secs.*, 137 S. Ct. at 2054–55 (emphasis added); *see also Smith*, 564 U.S. at 313 n.10 (describing *American Pipe* as holding that "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*" (emphasis added)); *Irwin*, 498 U.S. at 96 n.3 (describing *American Pipe* as holding that "plaintiff's timely filing of a defective class action tolled the limitations period *as*

to the individual claims of purported class members" (emphasis added)).

The question in this case is whether the principles underlying *American Pipe* and *Crown, Cork* justify extending the tolling rule recognized in those cases to subsequent *class* actions brought by formerly absent class members. The answer, for the reasons explained below, is no.

C. The Ninth Circuit's Decision Extending *American Pipe* to Follow-On Class Actions Is Inconsistent with Fundamental Principles of Equitable Tolling, Class Actions, and the Separation of Powers.

While this Court has repeatedly recognized that *American Pipe* only authorizes tolling during the pendency of a purported class action to allow formerly absent class members to press *individual* claims, the court of appeals extended *American Pipe* to allow formerly absent class members to bring an otherwise untimely *class* action. That decision must be reversed because it is inconsistent with the two bedrock elements of equitable tolling: plaintiff diligence and extraordinary circumstances justifying tolling. *See supra* at 25–26.

American Pipe and *Crown, Cork* tolling satisfies those elements. First, an absent class member acts diligently by relying on a pending class to represent her rights and then filing an individual claim when the class fails. Second, tolling of individual claims is necessary to avoid direct conflict with the policies underlying Rule 23, an extraordinary circumstance that justifies equitable extension of the limitations

period. A failure on either of these elements would require rejecting the court of appeals' rule. *See Menominee*, 136 S. Ct. at 755 (diligence and extraordinary circumstances are each "elements" of equitable tolling that must both be satisfied); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (same). But the court of appeals' rule flouts both: it authorizes tolling without diligence and identifies no federal policy that could provide the requisite extraordinary circumstance to justify tolling. Moreover, by extending *American Pipe* in a manner unmoored from these principles, the decision below undermines the separation of powers.

1. *Extending* American Pipe *to Class Actions Would Impermissibly Allow Tolling Absent Diligence.*

As explained above, *American Pipe* is a specific application of more general equitable tolling principles. *See supra* at 26–28. The *sine qua non* of equitable tolling has always been the requirement that a litigant pursue her rights diligently. As applied to individual actions, *American Pipe* and *Crown, Cork* are consistent with that requirement. The Ninth Circuit's expansion of *American Pipe* to follow-on class actions is not.

a. It is a "long-established principle[]" that the "lack of diligence precludes equity's operation." *Pace*, 544 U.S. at 419; *see also McQuiddy v. Ware,* 20 Wall. 14, 19 (1874) ("Equity always refuses to interfere" where the plaintiff has not been diligent "in the prosecution of rights."). That principle is "so fundamental and essential," in fact, that it has been regarded as a cardinal rule of equity, reflected in the

maxim "*Vigilantibus non dormientibus, aequitas subvenit*"—"equity aids the vigilant, not those who slumber on their rights." John N. Pomeroy, *A Treatise of Equity Jurisprudence, as Administered in the United States of America* § 363 (4th ed. 1907); Joseph Story, *Commentaries on Equity Jurisprudence* § 200a (12th ed. 1877) ("Courts of equity do not sit for the purpose of relieving parties . . . who refuse to exercise a reasonable diligence or discretion."); U. Blickensderfer, *Blackstone's Elements of Law Etc.* § 64.10 (1906) ("[N]othing can call [a court of equity] into activity but conscience, good faith and personal diligence.").

Diligence, Chief Justice Marshall observed, has been required "[f]rom the earliest ages." *Elmendorf v. Taylor*, 23 U.S. 152, 168 (1825). The rule was "repeatedly recognized in the British [chancery] courts," *Piatt v. Vattier*, 34 U.S. 405, 417 (1835), as early as 1767, when Lord Camden famously explained: "A court of equity . . . has always refused its aid to stale demands, where the party has slept upon his rights"; where "reasonable diligence" is "wanting, the court is passive and does nothing." *Smith v. Clay*, 3 Bro. Ch. Rep. 639, note (1767) (quoted by *Piatt*, 34 U.S. at 416–17). And the rule that equity aids only the diligent "has been acted on in the fullest manner by this court" since the country's founding, *Piatt*, 34 U.S. at 416–17; *see also, e.g.*, *Lupton v. Janney*, 38 U.S. 381, 386 (1839) (Story, J.).

That rule applies fully to equitable tolling of statutes of limitations, *see, e.g.*, *Menominee*, 136 S. Ct. at 755; *Credit Suisse*, 566 U.S. at 227; *Pace*, 544 U.S. at 419; *Rotella*, 528 U.S. at 560–61; *Irwin*, 498

U.S. at 96; *Baldwin*, 466 U.S. at 151; *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874). Equitable tolling, in other words, "has *always* been reserved only for parties who have pursued their rights diligently." *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1291 n.5 (11th Cir. 2002).

Indeed, this Court has explained that it would be "inequitable and inconsistent with the general purpose of statutes of limitations" to apply tolling where the plaintiff has not been "pursuing his rights diligently." *Credit Suisse*, 566 U.S. at 227 (internal quotation marks and alterations omitted). "Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to pursue his rights diligently." *CTS Corp.*, 134 S. Ct. at 2184 (internal quotation marks and alterations omitted); *see also, e.g.*, *Crown, Cork*, 462 U.S. at 352 ("Limitations periods are intended . . . to prevent plaintiffs from sleeping on their rights."); *Ross v. Duval*, 38 U.S. 45, 47 (1839) ("[Statutes of limitations] quicken diligence by making it in some measure equivalent to right."). Tolling without diligence would thus necessarily subvert "the legislative purpose" behind any limitations period, *American Pipe*, 414 U.S. at 559, and conflict with centuries of jurisprudence.

b. *American Pipe* is fully consistent with—and certainly cannot be "divorced from"—this "long-settled equitable-tolling principle." *Credit Suisse*, 566 U.S at 227. *American Pipe* recognizes that a plaintiff who "has slept on his rights" is not entitled to equitable relief, *American Pipe*, 414 U.S. at 554 (internal quotation marks omitted), and *Crown, Cork*

explains why that fundamental element of equity is satisfied as to individual actions: "Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." 462 U.S. at 352–53. In other words, the *American Pipe* rule recognizes that plaintiffs who seek to assert their rights can "rely on the existence of the [representative] suit to protect their rights" while that representative suit is pending. *Id.* at 350.

Once the pending class action fails, however, the only way formerly absent class members can continue to satisfy the diligence requirement is by filing suit to enforce their own rights. *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962) ("[F]iling [of a lawsuit] itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure."). Indeed, this diligence requirement is expressly set forth in both *American Pipe* and *Crown, Cork*. *American Pipe* holds that "the commencement of the original class suit tolls the running of the statute for all purported members of the class *who make timely motions to intervene* after the court has found the suit inappropriate for class action status." 414 U.S. at 553 (emphasis added). And *Crown, Cork* makes clear that once the class action fails (and tolling ends), former putative class members must either "file their own suits or . . . intervene as plaintiffs in the pending action" to protect their rights. 462 U.S. at 354.

c. The court of appeals' rule, by contrast, cannot be reconciled with this diligence requirement, in two respects.

First, and most important, extending *American Pipe* tolling to allow follow-on class actions necessarily means tolling the statute of limitations not just for the named plaintiff, but also for absent members of the original (i.e., timely) class *who continue to remain absent*. Those still-absent class members who did not bring suit or intervene even when the class failed have never done anything to protect their rights, let alone demonstrated diligence in doing so. Class members *who seek to assert their rights* 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 theirs. Their claims should expire in accordance with the statute. The court of appeals' extension of *American Pipe* to follow-on class actions gives absent class members rights that Congress did not intend and is inconsistent with centuries of equity jurisprudence.

Second, formerly absent class members who belatedly seek to lead a class action have also failed to exercise diligence warranting equitable tolling. As just explained, the *American Pipe* rule is based on the recognition that an absent class member whose goal is to preserve her rights can reasonably choose to "rely" on a pending class action to do so until the action fails. *Crown, Cork*, 462 U.S. at 350. But if an absent class member's objective is not just to preserve her own rights but also to lead a class action, it simply makes no sense to say that she can rely on

the pending class action to further that aim. To the contrary, it is by definition *unreasonable* for a class member whose goal is to represent the class to instead rely on someone else to represent that class.

In other words, there is no reason why a diligent aspiring class representative would fail to come forward until after another class member tries and fails to represent a class (much less allowing it to occur two separate times, as happened here). Class members (like respondents) who seek to represent a class only after class certification has been litigated and denied cannot possibly be said to have acted with the diligence that equity requires.

And while a potential class representative's failure to file a class action within the limitations period precludes tolling in any circumstance, it demonstrates a particularly egregious lack of diligence in the context of securities litigation governed by the PSLRA, which expressly encourages any class member who wants to represent the class to come forward as early as possible, so that the court can choose the best lead plaintiff. In particular, the PSLRA requires that once a class action is filed, early notice must be provided to class members concerning the "pendency of the action, the claims asserted therein, and the purported class period," 15 U.S.C. § 78u-4(a)(3)(A)(i)(I), precisely so that other putative class members can promptly move to participate as lead plaintiffs, *id.* § 78u-4(a)(3)(B). The district court is then directed to select among the potential candidates those "most capable of adequately representing the interests" of the class, *id.* § 78u-4(a)(3)(B)(i), as well as competent lead counsel, *id.* § 74u-

4(a)(3)(B)(v); Fed. R. Civ. P. 23(g)(2). In light of those provisions, it is especially unreasonable for a plaintiff who seeks to lead a securities class action to not come forward and participate in the lead-plaintiff selection process and instead wait until the limitations period has run to file a class complaint.

This case demonstrates the point. There is no question that PSLRA class notice was provided at the outset of the *Dean* action, and that respondents were fully aware of the facts that would support the claims pressed in the current complaint. *See supra* at 7–8. Numerous shareholders responded to the *Dean* class notice and sought to be designated as lead plaintiff, but respondents did not. So while respondents' reliance on the class action might constitute sufficient diligence for their personal claim under *American Pipe*, it demonstrates no diligence in preserving the ability to assert claims on behalf of others.

2. *The Extraordinary Circumstances Articulated in* American Pipe *to Justify Tolling for Individual Actions Do Not Apply to Tolling for Class Actions.*

That the Ninth Circuit's rule impermissibly authorizes tolling for non-diligent absent class members is reason enough to reject it. But diligence alone would not suffice; this Court has explained that some "extraordinary circumstance" must also justify tolling. *See, e.g.*, *Menominee*, 136 S. Ct. at 755; *ANZ Secs.*, 137 S. Ct. at 2052. Particularly relevant here, this Court has recognized that tolling is appropriate if it is necessary to protect an important policy embedded in a federal statute. *See, e.g.*, *Bur-*

nett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 434–36 (1965) (tolling of federal FELA statute of limitations authorized during pendency of state-court FELA action based on "the interests of uniformity embodied in the Act"). *American Pipe* gave effect to this principle, holding that tolling for individual actions was necessary to safeguard the policies reflected in Rule 23. There is no similar justification for extending the *American Pipe* rule to class actions. If anything, the Ninth Circuit's rule contravenes federal policy, including Congress's preference for early participation of potential lead plaintiffs under Rule 23 and the PSLRA.

a. As explained, the primary policy consideration driving *American Pipe* was that without tolling, any absent class member who wanted to preserve the ability to bring an individual claim would be forced to file a protective suit (or motion to intervene) while the putative class suit was pending. This Court explained that such a "multiplicity" of individual actions would frustrate the "principal purpose" of Rule 23—i.e., promoting judicial economy by discouraging individual actions when a representative action is pending. *American Pipe*, 414 U.S. at 551; *see also Crown, Cork*, 462 U.S. at 351. That concern by its terms does not justify tolling for subsequent class actions.

The court of appeals, however, believed that extending *American Pipe* to class actions is justified by the fear that rejecting tolling would result in "duplicative, protective class actions." Pet. App. 21a. That concern is misplaced for three reasons.

First, there is simply no reason to believe that enforcing statutes of limitations as to class actions will result in protective class filings. That concern was certainly reasonable for individual filings during the pendency of a putative class action: if absent class members believed that they could not rely on the pending suit to protect their rights, they would have to do so themselves by filing an individual action within the limitations period. Those people are protected under *American Pipe* regardless whether the tolling rule is extended to subsequent class actions.

The Ninth Circuit assumed that the same dynamic applies to class members who seek to represent the class. The court believed that tolling would cause such class members to wait to file a new class complaint until after the pending class action is adjudicated, while a lack of tolling would motivate them to file protective class complaints.

The assumption is incorrect. An individual who genuinely wants to represent the class—and not simply participate in a scheme to secure multiple bites at the class certification apple—*should not care about the outcome of this case*. Such an individual already has every incentive to file a class action (or intervene and seek to lead the pending action) as soon as possible regardless of any statute of limitations considerations, because failing to act early will almost certainly result in a different lead plaintiff's representation of the class. No one who wants to represent a class would reasonably rely on the pendency of an identical class action, since the existence of another such action does not protect—indeed, it undermines—the class member's ability to act as a

class representative. Thus, anyone who desires to represent a class would act promptly, regardless of tolling principles.

Second, and in any event, the Ninth Circuit's fear that enforcing statutes of limitations as to follow-on class actions will result in the filing of "protective" class actions is divorced from the policies underlying Rule 23. *American Pipe*, after all, was not concerned with the filing of protective individual actions in a vacuum—the problem the Court identified was that the proliferation of individual actions during the pendency of a potential class action is exactly what Rule 23 seeks to avoid. *American Pipe*, 414 U.S. at 553; *Crown, Cork*, 462 U.S. at 351.

Yet that is simply not true for the early filing of multiple class actions. Rule 23 emphasizes timely adjudication of a class's validity and focuses on ensuring that the class is adequately represented by the lead plaintiff and her counsel. *See*, *e.g.*, Fed. R. Civ. P. 23(c)(1)(A) (courts required to determine validity of class "[a]t an early practicable time"); Fed. R. Civ. P. 23(a)(4) (authorizing class certification only if "the representative parties will fairly and adequately protect the interests of the class"); Fed. R. Civ. P. 23(g)(2) (directing court to appoint lead class counsel "best able to represent the interests of the class"). The Rule thus *encourages* anyone who wants to represent the class to participate at the outset, rather than stepping up only if a first-mover's attempt fails. Rule 23 is intended to eliminate the need for a multiplicity of simultaneous individual suits when class-wide adjudication is possible, but it has no implicit or explicit aversion to the simultaneous filing

of multiple class actions. And indeed, the Ninth Circuit's chosen policy to avoid early potential-lead-plaintiff participation is *directly contrary* to Congress's pronouncement in the PSLRA that class members who seek to represent the class should come forward early to allow the district court to pick the best lead plaintiff. *See supra* at 7–8, 36–37. If the Ninth Circuit's rule undermines that result—as that court's own reasoning assumes—then it flatly contradicts express congressional policy and should be rejected out of hand.

Third, the answer to the Ninth Circuit's (misplaced) concern that enforcing statutes of limitations leads to the early filing of class actions is not to ignore those congressionally enacted time-bars but instead to employ the longstanding tools Congress has put in place for managing complex litigation. The U.S. Code and Federal Rules already provide tools to manage the existence of multiple class plaintiffs and class actions. *See Crown, Cork*, 462 U.S. at 353 (noting that "avenues exist by which the burdens of multiple lawsuits may be avoided"). For example, in securities cases the PSLRA anticipates the filing of multiple class action complaints at the outset of the litigation and requires the district court to consolidate those complaints before selecting the lead plaintiff. In non-securities cases, the Federal Rules of Civil Procedure allow district courts to consolidate multiple class actions pending in the same court. *See* Fed. R. Civ. P. 42(a). If multiple class actions are pending in different jurisdictions, they can be transferred to a single jurisdiction under 28 U.S.C. § 1404. Alternatively, "the Judicial Panel on Multi-

district Litigation has the authority to transfer related federal cases to one district court for consolidated and coordinated pretrial proceedings." *Manual for Complex Litigation, Fourth* § 21.15; *see* 28 U.S.C. § 1407. And even in the absence of formal coordination mechanisms, "[c]ourts rely on a variety of techniques to coordinate overlapping or duplicative [class actions], such as establishing coordinated schedules for discovery and the filing and briefing of motions." *Manual for Complex Litigation, Fourth* § 21.15. In other words, federal courts—largely because of tools Congress has provided them—are fully capable of managing multiple class actions. There is no basis for ignoring statutorily prescribed time limitations to solve a problem that does not exist.

b. The Ninth Circuit also held that its tolling rule was consistent with *American Pipe* because there is no "unfair surprise to defendants" in being subject to multiple class actions even after the limitations period has run, Pet. App. 21a, echoing *American Pipe*'s similar observation as to the rule authorizing tolling for individual actions, *see* 414 U.S. at 554. But that assertion is both irrelevant and wrong. As an initial matter, the absence of unfair surprise is not "an independent basis for invoking [tolling] and sanctioning deviations from established procedures"; rather, it is a policy rationale that supports tolling only "once a factor that might justify such tolling is identified." *Baldwin*, 466 U.S. at 152; *see also Menominee*, 136 S. Ct. at 757 n.5 ("[A]bsence of prejudice . . . is not an independent basis for invoking [tolling]." (internal quotation marks omit-

ted)). There is no justification for tolling here for the reasons already explained.

Moreover, and in any event, defendants would quite obviously be not only surprised but substantially prejudiced by a tolling rule applicable to follow-on class actions in a way they are not by allowing otherwise untimely individual actions once a class action fails.[2] For one thing, the time horizon for the filing of individual actions once a class action ends is finite—these actions must be filed before the tolled limitations period expires, and once they are litigated, any additional actions will be time-barred. The Ninth Circuit's rule, however, allows class actions to be stacked one after the other—tolling begins once a class action is filed, and then begins again once another one is filed, and so on. *See* Pet. App. 22a; *infra* at 46–47. No defendant expects to be subject to potentially perpetual class actions despite the existence of a statute of limitations. The prejudice to defendants is obvious, as is the inconsistency with the "basic policies of all limitations provisions:

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[2] In truth, China Ag was surprised here because the court of appeals disregarded its precedent to toll the limitations period in this case. The *en banc* Ninth Circuit had earlier interpreted American Pipe "not to allow tolling when the district court in the previous action had denied class certification, and when the second action sought to relitigate the issue of class certification and thereby to circumvent the earlier denial." *Catholic Social Servs., Inc. v. INS*, 232 F.3d 1139, 1147 (9th Cir. 2000). That is precisely what happened here, *see infra* Part II.B, yet the court of appeals extended *American Pipe* to follow-on class actions in all circumstances. The court of appeals believed that its new construction of *American Pipe* is mandated by this Court's recent precedents, but that is incorrect for the reasons explained below.

repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S. at 555.

Moreover, requiring defendants to litigate additional class actions is categorically different from requiring them to litigate additional individual actions. For one thing, the process of class discovery and class certification is expensive and time-consuming.

For another, allowing continuous class actions even after the limitations period has run creates incentives for plaintiffs' attorneys to continue to bring even meritless class claims, and for defendants to settle them. The payoff to plaintiffs' attorneys from successfully certifying a class, even a class that would pursue likely meritless claims, is immense. As this Court has repeatedly recognized, the mere pendency of a class action imposes substantial settlement pressure on the defendant. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc.,* 552 U.S. 148, 163 (2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit could allow plaintiffs with weak claims to extort settlements from innocent companies."). This dynamic is magnified by the prospect of relitigation of class certification. As Professor Redish has explained, the prospect of repeatedly litigating the validity of the same class "enables plaintiffs' lawyers to use the class device as a

means of legalized blackmail"; because the prospect of class certification never disappears, "defendants are effectively forced to 'buy' peace, even where such payments are wholly undeserved, by settling." Martin H. Redish, *The Need for Jurisdictional and Structural Class Action Reform*, 32 Envtl. L. Rep. (Envtl. Law Inst.) 10984, 10986 (Aug. 2002). Thus, unlike with individual actions, the Ninth Circuit's rule extending *American Pipe* to follow-on class actions extends indefinitely the asymmetric incentives and settlement pressures inherent in class litigation. This result, again, prejudices defendants and is irreconcilable with the fundamental purposes of statutes of limitations.

3. *Extending* American Pipe *to Follow-On Class Actions Is Inconsistent with Basic Separation-of-Powers Principles.*

Extending *American Pipe* tolling to follow-on class actions also would be inconsistent with the fundamental separation-of-powers principle that courts may not "override the statute of limitations Congress prescribed," *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1977 (2014), or "make the law instead of administering it," *Gabelli*, 568 U.S. at 454 (internal quotation marks omitted). As detailed above, Congress enacts statutes of limitations on the understanding that courts will enforce the historical limits of equity (e.g., the requirements of plaintiff diligence and extraordinary circumstances) and give effect to specific applications of equitable principles (e.g., *American Pipe*) rather than expanding them beyond recognition.

The Ninth Circuit fails this fundamental separation-of-powers test. For the reasons explained, the court of appeals' decision expanding *American Pipe* to toll the limitations period during the pendency of a class action to allow absent class members subsequently to bring new, otherwise untimely class claims cannot be reconciled with the traditional requirements of equity. To the contrary, the rule rewards plaintiffs and absent class members who sit on their rights. And it cannot be justified by the Rule 23 policies that animate *American Pipe*. The Court could thus affirm the decision below only by expanding the historical understanding of equity and the reasoning of *American Pipe*—a result foreclosed by the separation-of-powers rule that Congress and not this Court determines when claims are time-barred.

D. Extending *American Pipe* to Follow-On Class Actions Would Undermine the Policies Embodied in Statutes of Limitations and Result in Significant Adverse Practical Consequences.

1. The court of appeals' rule would also result in serious adverse policy consequences not present when tolling is limited to individual actions.

As then-Judge Alito recognized, the tolling rule the Ninth Circuit adopted below "could extend the statute of limitations almost indefinitely" by tolling it every time a new class action is filed. *Yang v. Odom*, 392 F.3d 97, 113 (3d Cir. 2004) (Alito, J., concurring in part). The court of appeals' perpetual tolling rule, in other words, "would allow a purported class almost limitless bites at the apple as it contin-

uously substitutes named plaintiffs and relitigates the class certification issue." *Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1326 (11th Cir. 2015).

Allowing "stacked" class actions would thus effectively eviscerate the limitations period for class litigation and would fundamentally undermine the most basic purposes of statutes of limitations, including plaintiff diligence, defendant repose, and the elimination of stale claims. *See supra* at 24. As this Court has already explained: "The potential for . . . endless tolling in cases in which a reasonably diligent plaintiff would know of the facts underlying the action is out of step with the purpose of limitations periods in general." *Credit Suisse*, 566 U.S. at 227–28; *see also ANZ Secs.*, 137 S. Ct. at 2054 ("The limitless nature of petitioner's argument . . . reveals its implausibility."). The *American Pipe* rule as this Court has always understood it—i.e., as applying only to individual claims—creates no similar harm.

2. Even the Ninth Circuit did not dispute that its perpetual-tolling rule raised the potential for "abusive filing of repetitive class actions." Pet. App. 22a. It concluded, however, that preclusion, attorney self-restraint, and comity were sufficient to prevent perpetual class actions. *Id.* The Ninth Circuit is wrong thrice over.

a. Preclusion principles cannot prevent serial relitigation of class actions even when the validity of class certification has already been litigated and rejected. This Court held in *Smith* that preclusion principles do not apply to class certification decisions because preclusion does not apply to absent class

members unless and until a class is certified. *See* 564 U.S. at 313–15. Thus, however the court of appeals believed that "principles of preclusion" might apply, they cannot apply to limit abusive relitigation of the validity of class certification. The proper mechanism to avoid such abusive litigation is to give effect to the statutes of limitations that Congress enacted and that courts are bound to enforce.

b. The court of appeals next concluded that plaintiffs' attorneys are likely to exhibit self-restraint and refrain from filing new class actions when previous ones have failed. Pet. App. 22a. This is a particularly odd case in which to come to such a counterintuitive conclusion, since it is the *third* of three identical class actions. And in truth, the court of appeals' decision creates just the opposite incentives. As explained earlier, the very prospect of repeated relitigation of class certification only strengthens the already strong incentives defendants have to avoid the high costs of class discovery—and the even higher potential liability that would arise if class certification were granted—by settling even meritless claims. *See supra* at 44–45. Thus, the fact that similar class litigation has failed in the past will not dissuade plaintiffs' counsel from trying again, since even meritless claims may result in lucrative settlements. Again, the way to avoid that result is by foreclosing additional class litigation completely once the congressionally prescribed time bar has run—precisely the solution the court of appeals inexplicably rejected.

c. Finally, the Ninth Circuit believed that judicial comity will prevent the otherwise adverse consequences of serial class litigation.

As an initial matter, comity is no substitute for a statutory time bar. "The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination" inherent in the determination whether to grant comity to the decision of another court. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). It is one thing to equitably toll the limitations period for a short and finite period to allow individuals to bring their own claims. But a rule allowing a string of previously absent class members to try their hand at certifying a class, subject only to judicial discretion, is flatly inconsistent with Congress's judgment in enacting a statute of limitations in the first place.

And whatever protection judicial comity might provide against abusive litigation would be weak at best. Comity requires courts only to "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). There is no reason to believe that this loose doctrine would provide any material protection against the abuse the Ninth Circuit's rule invites.

This case illustrates the point. After Judge Klausner denied class certification on predominance

grounds in *Dean*, Smyth filed "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 class allegations should be stricken as a matter of comity to his own prior denial of class certification. *See* JA 263-64. In other words, the doctrine of comity may not preclude relitigation of class certification *even before the same judge*. What does preclude such abuse is the vehicle Congress chose here—the statute's "generally hard and fast" time bar. *SCA Hygiene*, 137 S. Ct. at 960. This Court should give effect to Congress's determination and reverse the decision below.

E. The Ninth Circuit Erred in Relying on this Court's Precedents to Extend *American Pipe* to Follow-On Class Actions.

The court of appeals believed that three recent precedents of this Court compelled it to hold that *American Pipe* tolls the limitations period during the pendency of a class action not only for absent class members to file individual claims but also for them to file duplicative class actions. Pet. App. 17a-21a. The Ninth Circuit misconstrued this Court's cases.

One of those cases—*Tyson Foods*—makes no reference to *American Pipe* tolling or the interplay between statutes of limitations and class actions, which is presumably why respondents did not cite it in their opposition to certiorari.

The second case is *Smith*, but that decision also did not concern equitable tolling, and its one mention of *American Pipe* reaffirms that decision's limitation to individual claims, explaining that "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*." 564 U.S. at 313 n.10 (emphasis added).

Finally, the court of appeals relied heavily on *Shady Grove*, which the court believed requires extending *American Pipe* to class actions. That understanding is based on a misreading of both *Shady Grove* and *American Pipe*.

Shady Grove had nothing to do with equitable tolling. Rather, it addressed whether a state law limiting the certifiability of certain classes can bind federal courts sitting in diversity. *See Shady Grove*, 559 U.S. at 398 (plurality opinion). The Court held that only Congress, not a state, can create exceptions to the Federal Rules of Civil Procedure. The Court therefore concluded that all individual claims that can be brought in federal court can be aggregated under Rule 23, even if such claims could not be aggregated if brought in state court. *Id.* at 398–406. The Ninth Circuit believed that this principle required extending *American Pipe* to class actions, reasoning that if *American Pipe* tolls the claims of every absent class member, and *Shady Grove* requires the Court to permit aggregation of individual claims, then *American Pipe*'s tolling rule must apply equally to class actions and individual claims. Pet. App. 17a. That reasoning is incorrect in two ways.

First, it rests on the premise that every absent class member is entitled to *American Pipe* tolling. But that is a faulty premise. As explained earlier, *American Pipe* tolls the limitations period for absent class members who act diligently to protect their rights by reasonably relying on the class mechanism and then filing their own claim if the class fails. *See supra* at 26–29. Most obviously, *American Pipe* does not toll the limitations period for absent class members who remain absent even after the class action fails—i.e., absent class members who are not entitled to equity because they have failed to diligently protect their rights. *See supra* at 35. *Shady Grove* simply does not require or even authorize courts to toll statutory time bars in those circumstances.

Indeed, the court of appeals' reasoning is foreclosed by the Rules Enabling Act, 28 U.S.C. § 2072(b), which precludes construing the federal rules of procedure as enlarging preexisting substantive rights and "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove*, 559 U.S. at 408 (plurality opinion). As a matter of logic, if an absent class member does not file her own suit when the class fails, she would not benefit from equitable tolling. Yet under the Ninth Circuit's reasoning, these same absent class members *do* get the benefit of equitable tolling simply because another class action was filed. Construing Rule 23 to render an individual's untimely claim timely cannot be squared with the Rules Enabling Act.

Second, even if *American Pipe* could be construed as applying to every absent class member in the cir-

cumstances presented there, the court of appeals' reasoning is still exactly backwards. Limitations periods apply unless there is some "extraordinary" justification that requires the period to be tolled. In other words, when an individual files a claim outside the limitations period, that claim is time-barred *unless* there is some particularly compelling reason to allow it to go forward. Thus, *Shady Grove* does not help respondents—their claims as well as those of absent class members are all untimely unless there is a compelling basis for tolling.

There is not. For one thing, there is no basis to reward the named plaintiffs' inexplicable delay in seeking to represent a class that has already been adjudicated and rejected—in this case, twice. Moreover, the compelling justification for tolling recognized in *American Pipe* and *Crown, Cork*—allowing absent class members to rely on a pending class action and thereby avoid prophylactic, duplicative litigation inconsistent with Rule 23—does not apply here for the reasons already explained. *See supra* at 37–45. In fact, allowing tolling in these circumstances would benefit only plaintiffs' counsel and lead to significant adverse consequences. *See supra* at 44–47. There is no equity in extending tolling in these circumstances. The Court should thus refuse to expand the *American Pipe* rule to permit plaintiffs to assert otherwise untimely claims for not only themselves but also absent class members.

II. *AMERICAN PIPE* AT THE VERY LEAST DOES NOT APPLY WHEN THE PROPRIETY OF CLASS TREATMENT HAS BEEN PREVIOUSLY ADJUDICATED.

For the reasons just explained, equitable principles, established precedent, and sound policy all preclude extending *American Pipe* tolling beyond the individual claims of absent class members to new follow-on class actions. But even if such tolling would somehow be appropriate in some circumstances, it is certainly inappropriate when (as here) a court has already adjudicated and rejected the suitability of the claims for class treatment. There is simply no equitable ground to allow for the relitigation of a class's viability once the statute of limitations has run. And because the district court in the *Dean* action held that the proposed class failed on predominance grounds, respondents' class claims must fail.

A. It Would Be Inequitable to Toll a Limitations Period to Allow Relitigation of Class Certification.

There is no equity in allowing an untimely attempt to relitigate class certification when it has already been denied based on the unsuitability of the claims for class treatment. Two circuits have adopted this approach, permitting tolling where "certification has been denied solely on the basis of the lead plaintiff's deficiencies"—i.e., typicality and adequacy—and rejecting tolling where there has already been an adverse "class-based determination." *Yang*, 392 F.3d at 111; *see also Great Plains Tr. Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007). Even if this Court declines to foreclose equitable toll-

ing for class actions in all circumstances, it should at a minimum adopt the limitation on tolling recognized by the Third and Eighth Circuits.

1. As an initial matter, extending *American Pipe* tolling to subsequent class actions after the initial action failed because of the unsuitability of the class would be inconsistent with a major premise underlying the *American Pipe* rule. As explained, that rule rests on the principle that it is reasonable for a diligent plaintiff seeking to protect her own rights to rely on the pendency of a class action until that action fails. *See supra* at 26–29, 33–34. That may be true before the validity of the class has been litigated. But once a court has determined that a class cannot proceed, relying on subsequent class actions to protect one's rights is no longer reasonable. A diligent plaintiff would, like the plaintiffs in *American Pipe* and *Crown, Cork*, file her own action.

The Ninth Circuit's rule, however, would extend equitable tolling to absent class members who did nothing to assert their rights even when the case was deemed unsuitable for class-wide adjudication. Potential plaintiffs who rely on the class mechanism after it has been rejected have not been diligent and cannot benefit from equitable tolling of the statute of limitations.

2. Even setting aside this insurmountable obstacle, *American Pipe* tolling should not be extended in these circumstances because doing so would be inequitable. It is a fundamental rule of equity jurisprudence that courts of equity will never act when "by granting the relief asked," "injustice would be done." *Abraham v. Ordway*, 158 U.S. 416, 420 (1895). Ex-

tending relief under *American Pipe* to class actions when the validity of class-wide adjudication has already been litigated and rejected would work a substantial injustice. After all, such a rule would allow plaintiffs to repeatedly challenge decisions about the merits of class treatment and "stack[] . . . class action suits indefinitely." *Yang*, 392 F.3d at 112 (internal quotation marks omitted). Defendants would be subjected to the "expense and vexation attending multiple lawsuits," *Montana v. United States*, 440 U.S. 147, 153 (1979), including burdensome class discovery. Precious judicial resources would needlessly be consumed relitigating an issue that has already been determined on the merits with all the protections of Rules 23(a) and (g) and the possibility of rigorous appellate review. And allowing relitigation of such class certification determinations would inevitably undermine confidence in the judicial system, since the very purpose of relitigating the validity of class treatment is to produce an inconsistent decision.

For precisely these reasons, courts of equity have long intervened "to avoid the relitigation of questions once settled." *Riverdale Cotton Mills v. Ala. & Ga. Mfg. Co.*, 198 U.S. 188, 195 (1905) (internal quotation marks omitted). Collateral estoppel, for example, protects against relitigation of issues. It is true that absent class members cannot be precluded from timely relitigating class certification because they were not parties to the original action. *Smith*, 564 U.S. at 313. But that hardly means that equity should be invoked *to overcome an otherwise applicable time bar* merely to permit them to do so. Once a

claim has been found unsuitable for class treatment, there is simply no equity in allowing the same issue to be relitigated beyond the strictures Congress established.

3. Nor is there any compelling justification to extend tolling to allow relitigation of the validity of a class when certification has been denied for a class-based reason. Absent class members' individual claims are already fully protected by *American Pipe*. And when class treatment is rejected because of a failure in the class rather than a failure of the lead plaintiff, absent class members cannot complain that their absence prejudiced the result—particularly when, as here, they had every opportunity and incentive to come forward if they believed they could litigate class certification better than others, *see supra* at 8. The question of whether their claim is suitable for class adjudication has already received "one full and fair opportunity for judicial resolution," *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328 (1971), and there is no plausible equitable principle warranting redetermination of that question after the limitations period has run.

B. This Class Action Is Untimely Under That Principle.

1. Were the Court to adopt this limiting rule, respondents' class claims would be time-barred. The *Dean* class action was rejected not because of any defect with the *Dean* plaintiffs, but because the class lacked predominance. *See* Fed. R. Civ. P. 23(b)(3).

There is no dispute that this action was "based on the same facts and circumstances, and on behalf of

the same would-be class," as in *Dean*. Pet. App. 8a. Nor is there any dispute that the district court in the *Dean* action denied certification because the *Dean* plaintiffs were "unable to establish that questions of law or fact common to class members predominate over any questions affecting any individual members." JA 192. That should be the end of the matter: Because the would-be class has already had one full and fair opportunity to litigate the merits of class certification, their claims should not be tolled to allow them yet another chance to litigate certification.

2. In the court of appeals, respondents argued that even this modest limitation on relitigation should not apply to their claims. According to respondents, although the *Dean* court denied the certification motion on predominance grounds, the decision really was not a determination on the suitability of the claims for class treatment because it rested on the *Dean* plaintiffs' experts' failure to prove up their fraud-on-the-market theory.

But the equitable principle against relitigation applies so long as there is a class-based determination, even if the court "couche[s] its findings in terms of [plaintiff's] failure to meet her burden." *Yang*, 392 F.3d at 110–11. That rule makes perfect sense. The denial of class certification can always be recharacterized as a failure of proof by the plaintiffs, and no court decides based on evidence not before it whether a class could *ever* be certified. Thus, as the district court rightly recognized, respondents' attempt to skirt its predominance finding by re-characterizing it as a plaintiff-specific failure would "allow for tolling to extend indefinitely as class action plaintiffs re-

peatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence." Pet. App. 36a.

Moreover, there will always be subsequent plaintiffs and attorneys lining up to file another class action on the theory that they could have done a better job litigating class certification. But the district court expressly determined that the *Dean* plaintiffs were adequate class representatives "represented by qualified and competent counsel," with "significant experience in litigating complex class actions, especially in the area of securities fraud." JA 186. Had respondents here believed that they could represent the class better than the *Dean* plaintiffs could, they had notice and every opportunity to seek to be named as lead plaintiffs. *See supra* at 8. They instead did nothing until the statute of limitations had run. The only result consistent with Congress's decision to subject respondents' claims to a 2-year statute of limitations—not to mention with equity—is to dismiss respondents' class claims as time-barred.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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