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 OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

JOHN F. KUPPENS
President,
DRI–THE VOICE OF THE DEFENSE BAR
55 West Monroe St.
Chicago, IL 60603
(312) 795-1101

ROBERT L. WISE
Counsel of Record
Robert.Wise@bowmanandbrooke.com
BOWMAN AND BROOKE LLP
901 East Byrd Street, Suite 1650
Richmond, VA 23219
(804) 649-8200

SUSAN E. BURNETT
BOWMAN AND BROOKE LLP
2901 Via Fortuna Drive, Suite 500
Austin, TX 78746

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page

STATEMENT OF INTEREST[1]

Amicus curiae DRI – The Voice of the Defense Bar (www.dri.org) is an international organization composed of more than 22,000 attorneys who defend the interests of industries, businesses, and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of the civil defense bar; promoting appreciation of the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* in carefully selected cases in which this Court is presented with questions that are exceptionally important to civil defense

---

[1] Pursuant to Supreme Court Rule 37(a) Petitioner and Respondents Schoenke, Heroca Holding B.V., and Ninella Beheer, B.V.—the only respondents to have entered an appearance in this Court—have submitted letters granting blanket consent to *amicus curiae* briefs. As the district court's docket reflects (No. 2:14-cv-05083, ECF No. 110 (C.D.C.A. Dec. 13, 2017), Charles Law's claims were dismissed with prejudice on entirely different grounds, which are not at issue in this appeal, and he waived any right to respond to the petition for certiorari. In accordance with Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

attorneys, their clients, and the conduct of civil litigation.

The businesses that DRI's members represent are regular targets of class action litigation. Across industries within the United States, businesses spent $2.7 billion on class action litigation in 2016.[2] Managing the litigation risk of class action lawsuits is among the chief concerns of businesses represented by DRI members. Class actions create unpredictable risks and complicate exposure estimates that are critical to business and litigation planning. They also have the well-recognized abusive potential to put businesses to a Hobson's choice—take the risk of potentially ruinous liability, or capitulate and buy peace.

DRI's members regularly litigate the defense of complex class action issues, and counsel businesses about their legal exposure in class action litigation. Their collective experience offers an informed perspective on the negative policy implications of indefinite class action tolling that the Ninth Circuit should have thoroughly analyzed, but did not.

The Ninth Circuit here followed the Sixth Circuit's drastic expansion of an equitable tolling rule applicable to class actions that this Court created decades ago, before class actions became an unfortunate cost of doing business in this country. *See*

---

[2] 2017 CARLTON FIELDS CLASS ACTION SURVEY, www.classactionsurvey.com/pdf/2017-class-action-survey.pdf at 2.

Am. Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974); *Crown, Cork, & Seal Co. v. Parker,* 462 U.S. 345 (1983). As broadened by the Ninth and Sixth Circuits, this tolling rule, if allowed to stand, would permit litigants to "stack" equitable tolling periods and thereby indefinitely toll statutes of limitation.

This rule would significantly add to the burden of litigation uncertainty under which the businesses served by DRI's members operate. These companies—who employ millions of people and are the economic engine of the country—rely on reasonable predictability and finality in the civil justice system to operate efficiently. The expansion of judge-made exceptions to statutes of limitation undermine those interests. The decision below amplifies the abusive potential of the class action device by hamstringing an important statutory defense. It is critical to those businesses that this Court correct this error.

SUMMARY OF ARGUMENT

Rule 23 provides a carefully circumscribed exception to the rule that litigants must pursue their claims individually. It was designed to balance the goals of litigation efficiency with fairness to defendants facing the prospect of aggregated claims. Over forty years ago, the Court created a limited equitable exception to statutes of limitation in the context of class actions under Rule 23. *Am. Pipe*, 414 U.S. at 561; *Crown, Cork,* 462 U.S. at 354. It, too, reflects a balancing of interests: to effectuate the litigation-efficiency goal of Rule 23 without unduly impairing "the functional operation" of federal

statutes of limitation and the protections they afford defendants. *Am. Pipe*, 414 U.S. at 554. To strike that balance, *American Pipe* must be read to hold that a timely filed class action complaint pauses the limitations clock for prospective class members, who, if certification is denied, may pursue their claims *on an individual basis* within whatever is left of the statutory limitations period. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990) (stating that *American Pipe* tolls the "*individual claims* of purported class members" (emphasis added)).

Since these decisions, the Court has never expanded *American Pipe* tolling. Most lower courts generally have declined to expand it as well, recognizing the perils and mischief such expansion would introduce.[3] These courts forbid litigants from

---

[3] *See, e.g., Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998) ("Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely. Permitting such tactics would allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations against all such potential litigants, regardless of how many times a court declines to certify the class."); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) (same); *Korwek v. Hunt*, 827 F.2d 874, 870 (2d Cir. 1987) (concluding that extending *American Pipe* to stacked class actions is "inimical" to statutes of limitations); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (holding that allowing putative class members to "piggyback one class action onto another" would lead to abuse).

"stacking" tolling periods by serially refiling new class actions that would-be time-barred but for the equitable exception created by *American Pipe*. That limit is fully consistent with the balancing of equities reflected in *American Pipe* and *Crown, Cork*.

The Ninth Circuit has upended that balance. Under the rule it adopted, an individual granted a temporary and exceptional reprieve from a statutory deadline to preserve his own claims may employ subsequent class actions to extend the reprieve indefinitely—including for all other putative class members who chose not to sue. Under this approach, multiple tolling periods are "stacked" on those that precede them, federal statutes of limitations are thereby suspended indefinitely, and businesses are unable to close their books on unpredictable liability exposure.

The Ninth Circuit's reasoning abandons first principles. The class action itself is an exceptional procedural device with well-recognized abusive potential. *American Pipe* equitable tolling is further an exceptional remedy, with its own abusive potential. Contrary to the Ninth Circuit's interpretation, this Court's decisions in *Shady Grove* and *Tyson Foods* do not require marrying the two—extending a limited equitable reprieve for individual litigants to would-be class representatives under Rule 23.[4] The Ninth Circuit paid little attention to the negative policy consequences of indefinite tolling, when that should have been at the heart of the court's analysis. Indeed,

---

[4] *Shady Grove Ortho. Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

Smith v. Bayer, on which the Ninth Circuit mistakenly relied in this regard, underscores how far-reaching those consequences are.[5]

The rule adopted by the Sixth and now the Ninth Circuits will negatively impact the civil justice system and those who rely on it to settle disputes with fairness and finality. Permitting plaintiffs to use the class action device to circumvent statutes of limitation indefinitely fosters strategic delay and promotes inefficiency. Most critically from the perspective of *amicus curiae*, it also significantly and unjustifiably burdens the businesses that are the primary targets of class action litigation.

ARGUMENT

I. THE NINTH CIRCUIT'S EXPANSION OF *AMERICAN PIPE* DOES NOT INDEPENDENTLY PASS EQUITABLE MUSTER.

A. Stacked class action tolling creates significant new policy concerns.

The rule adopted in *American Pipe* and *Crown, Cork* allows would-be class members to "bet" on class certification without losing their individual claims if they lose the bet. *See Am. Pipe*, 414 U.S. at 561; *Crown, Cork*, 462 U.S. at 354. Extending this limited tolling period, the Court found, avoids burdening courts with multiple protective filings that would reduce "the efficiency and economy of litigation which

---

[5] *Smith v. Bayer Corp.*, 564 U.S. 299 (2011).

is a principal purpose of the [class action] procedure." *Am. Pipe,* 414 U.S. at 553, 554; *see also Crown, Cork*, 462 U.S. at 350 (noting same potential "inefficiencies" justify tolling for individually filed claims as well as interventions in the failed class action).

Of course, to further the efficiency goal of Rule 23, *American Pipe* tolling also interferes with statutes of limitation that are "'fundamental to a well-ordered judicial system.'" *Artis v. D.C.*, No. 16-460, slip. op. at 19 (U.S. Jan. 22, 2018) (quoting *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980)). A tolling rule that stops the limitations clock—as in *American Pipe*—has the potential to extend the life of otherwise time-barred claims "not only by weeks or months but by many years." *Artis*, (Gorsuch, J., dissenting), slip op. at 1.

American Pipe tolling also creates the potential for abuse, including an incentive for lawyers "to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." *Am. Pipe,* 414 U.S. at 561 (Blackmun, J., concurring). And as reflected in Justice Blackmun's comment, it not only protects those who were aware of their claims and chose to bet on class certification, but those who were ignorant through lack of diligence and do not merit equitable relief. Just last Term, the Court remarked on *American Pipe*'s failure to consider the plaintiffs' diligence or "whether some extraordinary circumstance prevented them from intervening earlier[.]" *Cal. Pub. Emps.' Ret. Sys. (CalPERS) v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2052 (2017).

But whatever its analytic shortcomings, *American Pipe* created an equitable exception with a fixed duration. Tolling pauses the limitations clock "only during the pendency of the motion to strip the suit of its class action character." *Am. Pipe*, 414 U.S. at 561. If certification is denied, the equitable reprieve lasts only until the residuum of the statutory limitations period runs out—a mere 11 days in *American Pipe*. 414 U.S. at 561. This limited equitable exception balances efficiency under Rule 23 with the important goal statutes of limitation serve—to "'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.'" *Burnett v. N.Y. Cent. R.R. Co.,* 380 U.S. 424, 428 (1965) (quoting *R.R. Tele. v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348 (1944); *see also Artis*, slip op. at 19 (observing that primary purposes of statutes of limitation include to prevent surprise to defendants and bar those who have slept on their rights) (citing *Am. Pipe*, 414 U.S. at 554)). It reduces only temporarily the ability of businesses facing class actions to estimate exposure and predict and manage litigation risk.

The Ninth Circuit upended this balance by jettisoning the requirement that a class action complaint be timely-filed to have tolling "power." Pet. App. 22a; *see also Phipps v. Wal-Mart Stores, Inc.,* 792 F.3d 637, 652 (6th Cir. 2015) (extending equitable tolling to class actions filed after the statutory deadline to the same extent as individual actions).

It is self-evident that the policy concerns raised by temporarily tolling a statute of limitations pale in comparison to those raised by tolling it indefinitely. Yet, the Ninth Circuit did not examine the effects of the rule it created through the lens of equity. Consequently, it paid little attention to the negative implications of drastically curtailing a statutory defense on which businesses rely to provide predictability, certainty, and finality in class action litigation.

Equity demands a thorough policy analysis of stacked class action tolling that takes account of the practical realities of modern class action litigation. Since the Court adopted *American Pipe* tolling over forty years ago, the "exceptional" class action device has become an unfortunately routine cost of doing business in the United States, and that cost trends upward. Of the 70 percent of surveyed businesses managing at least one class action in 2016, 17.6 percent reported facing class claims "every year or two" (up from 11.9 percent in 2015), and the percentage reporting class actions to be "rare" fell by six points, to 13.2 percent. CARLTON SURVEY, *supra* n. 2 at 11. As compared with 2015, according to the survey authors, "twice as many companies are facing bet-the-company class actions in which the exposure is deemed potentially devastating to the company." *Id.* at 14.

The decades since *American Pipe* also have seen the proliferation of class actions based on technical statutory violations—frequently involving federal statutes—in which putative class members suffered

little or no economic harm. *See* Joanna Shepherd, An Empirical Survey of No-Injury Class Actions, Legal Studies Research Paper Series, available at http://ssrn.com/abstract=2726905 (2016). In 432 such actions pending during 2000 to 2015, the aggregate monetary value of settlements and awards was estimated to be approximately $4 billon. *Id*. at 2.

It is far from clear, however, that the increase in class action litigation has benefitted consumers. *See*, *e.g.*, Shepherd at 2; Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*.[6] What is clear is that class actions, whether meritorious or not, impose significant costs on businesses. One aspect of that cost is the unpredictability stemming from the complexity and variable application of class action law. *See, e.g.*, Edward Soto and Erica Rutner, *Ascertainability Requirement Leads to Inconsistency and Uncertainty in Class Actions*.[7] Another is the potential for huge losses when aggregated claims are tried. Indeed, courts have recognized that "however small" the risks may be "of potentially ruinous liability," the risks inherent in class actions can put "hydraulic pressure on defendants to settle, avoiding the risk . . . ." *E.g.*, *Newton v. Merrill Lynch Pierce Fenner & Smith*, 259 F.3d 154, 163 (7th Cir. 2001).

---

[6] http://mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

[7] apps.americanbar.org/litigation/committees/products/articles/summer2016-0816-ascertainability-requirement-leads-to-inconsistency-undertainty-class-actions.html.

Stacked class action tolling has the potential to exponentially increase this unpredictability and uncertainty in class action litigation by removing a deadline by which to calculate risk. *See McCann v. Hy-See, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011) ("[B]usiness planning is impeded by contingent liabilities that linger indefinitely."). Consumers as well as business are harmed by the resulting inefficiency.

By extending *American Pipe* tolling without meaningfully analyzing the consequences, the Ninth Circuit disregarded the rule's roots in equity. Equitable tolling is a "rare remedy to be applied in unusual circumstances[.]" *Wallace v. Kato*, 549 U.S. 384, 396 (2007). Before expanding a "rare remedy," courts must address whether the result would be equitable. The very purpose of equity is to provide courts with the flexibility "'to meet new situations" and determine on a case-by-case basis whether extraordinary circumstances justify relief from legal requirements. *Holland v. Fla.*, 560 U.S. 631, 650 (2010) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)).

B. Rule 23 does not displace equitable principles.

In large part, the Ninth Circuit treated policy concerns dismissively based on its misinterpretation of two of this Court's opinions. Pet. App. 20a (citing *Shady Grove v. Allstate Ins. Co.*, 559 U.S. 393 (2010), & *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016)). In effect, it read these cases to create a presumptive right to invoke Rule 23 that trumps

equitable principles. *See* Pet. App. 22a (unless court applies comity or preclusion principles, plaintiffs who satisfy Rule 23 "are entitled to bring their timely individual claims as named plaintiffs in a would-be class action"); *see also Phipps*, 792 F.3d at 653 (plaintiffs who benefitted from *American Pipe* tolling are "entitled to seek class certification under Rule 23") (citing *Shady Grove*, 559 U.S. at 398)). It is important that the Court correct this error, and reaffirm that Rule 23 does not immunize class actions from precepts of equity.

Shady Grove did not address equitable principles; it resolved a conflict between Rule 23 and a New York state law that prohibited class actions in certain types of cases. The Court held that because Rule 23 was applicable and valid, it controlled. 559 U.S. at 398. It rejected the defendant's attempt to avoid the conflict by distinguishing "eligibility" for class treatment under New York law from certifiability under Rule 23. The Court explained that Rule 23 is not limited to claims "made eligible for class treatment by some *other* law." *Id.* at 399 (emphasis in original). Rather, it "permits all class actions that meet its requirements[.]" *Id.* at 401.

It was in the context of illustrating the conflict between Rule 23 and state law that the Court referred to "a categorical rule" entitling a plaintiff to invoke Rule 23 regardless of "some *other* law." *Id.* at 399 (emphasis in original). Disregarding context, the Ninth Circuit interpreted "other law" to include federal statutes of limitation Pet. App. 17a (the "statute of limitations is not part of Rule 23, but is,

instead, 'some other law'"); *see also Phipps*, 792 F.3d at 652 (citing *Shady Grove*'s reference to a "categorical rule" to support extension of equitable tolling to class actions). Under this reasoning, statutes of limitation would never apply to class actions because limitations are "other law" not referenced in the text of Rule 23. This would be an absurd result, not to mention at odds with *American Pipe* itself. This Court should set the record straight to prevent other courts from similarly misconstruing the relationship between Rule 23 and statutes of limitation.

The Ninth Circuit similarly misread *Tyson Foods*, where the Court held that it would be inconsistent with the Rules Enabling Act to bar statistical evidence relevant to an individual claim simply because it is offered on behalf of a class. *Tyson Foods*, 136 S. Ct. at 1046–48 (citing 28 U.S.C. § 2072(b)). Though *Tyson Foods* had nothing do with equitable exceptions, the Ninth Circuit read this discussion to support, if not mandate, extending equitable tolling to class actions to the same extent as individual actions. Pet. App. 21a.

But if the Rules Enabling Act constrains courts' equitable power to treat class and individual actions differently when justice requires, then *American Pipe* itself was wrongly decided. If the Court has the inherent equitable power to create a class action-specific tolling rule, it has equal power to limit the scope of that rule.

The Ninth Circuit's error stems from an implicit assumption that Rule 23, not equitable principles, informed the analysis in *American Pipe*. But recently

in *CalPERS*, the Court put to rest the notion that Rule 23 requires equitable tolling in class actions, explaining:

> Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule. Nor could it have. The central text at issue in *American Pipe* was Rule 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars.

CalPERS, 137 S. Ct. at 2051–52; *cf. Holland*, 560 U.S. at 632–33 (explaining in federal habeas case, "[n]o pre-existing rule of law or precedent demands a rule" prohibiting equitable tolling based on attorney misconduct).

In sum, neither Rule 23, the Rules Enabling Act, nor this Court's precedents require expanding *American Pipe* tolling to class actions. To the contrary, this Court's relevant opinions—those addressing the rare remedy of equitable tolling—preclude this expansion.

II. STACKED CLASS ACTION TOLLING IS INEQUITABLE.

The Ninth Circuit went astray by not returning to first principles before undertaking its analysis. The class action device is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v.*

Yamasaki, 442 U.S. 682, 700–01 (1979)). Equitable tolling is further an exceptional remedy, available only in extraordinary circumstances. *See Menominee Indian Tribe of Wisc. v. United States*, 136 S. Ct. 750, 756 (2016). In other words, *American Pipe* applied an exceptional remedy to already exceptional procedural device. The result was to give that exceptional device an exceptional power—to toll limitations for individuals with otherwise untimely claims. But to have that power, the class action itself had to be timely.

The policy concerns raised by giving this "exceptional" tolling power to an indefinite series of *untimely* class actions overwhelmingly counsel against doing so. Most critically for the businesses that *amicus curiae*'s members represent, handing operational control of statutes of limitations to the lawyers who file class actions vastly increases the uncertainty and unpredictability already inherent in class action litigation. And the mere status of "would-be class representative" does not mean an individual meets the threshold requirements to merit equitable relief in the first place.

A. Tardy prospective class members do not meet threshold prerequisites.

A litigant seeking equitable tolling must show: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649. These two components are "'elements,' not merely factors of indeterminate or commensurable

weight." *Menominee*, 136 S. Ct. at 756 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The justifications offered in defense of stacked class action tolling satisfy neither requirement.

First, no obstacle prevents would-be class representatives from timely filing their own class actions. *Id.* (explaining that extraordinary circumstances means something outside the litigant's control). Betting mistakenly that a timely filed class will be certified is not even "'a garden variety claim of excusable neglect,'" much less an extraordinary circumstance excusing delay. *Id.* at 757 (quoting *Irwin*, 498 U.S. at 96); *see also id.* at 756 (holding that individual litigant's mistaken belief that it fell within a putative class and would benefit from *American Pipe* tolling insufficient).

Second, those who wish to serve as representative plaintiffs (and their lawyers) face elevated responsibilities. *See Nat'l Ass'n of Reg'l Med. Programs v. Mathews*, 551 F.2d 340, 346 (D.C. Cir. 1976) ("Class actions involve the delegation of authority to a named representative to pursue a common goal."). Would-be class representatives hardly exhibit diligence by waiting to see what happens before throwing their hats in the ring. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (noting that statutes of limitation encourage "diligent prosecution of known claims").

Unnamed class members who would benefit from stacked tolling likewise face no impediment to seeking relief individually after certification is

denied—thanks to *American Pipe*. The burden of doing so is low, not an obstacle. *See Menominee*, 136 S. Ct. at 757 (supporting that risk and expense of filing timely claim "is far from extraordinary").

As the Court recognized in *CalPERS*, *American Pipe* did not expressly consider the obstacle and diligence prongs of equitable tolling. 137 S. Ct. at 2052. Those two elements are threshold requirements under the Court's more recent opinions. One might argue they were not met in *American Pipe* and *Crown, Cork*. But if *American Pipe* is susceptible to this criticism, it is even more important that any proposed expansion of its holding face a more rigorous examination.

In any event, stacked class action tolling fails even under the relaxed standards of diligence and extraordinary circumstances the Court applied in *American Pipe* and *Crown, Cork*. Individuals who rely on a timely filed class action to vindicate their rights, the Court found, are acting rationally, not exhibiting a lack of diligence. *See Crown, Cork*, 462 U.S. at 352 (explaining that because Rule 23 "permits and encourages" reliance on class representatives to prosecute claims, unnamed class members who rely on them are not "sleeping on their rights"). It is fair to allow such individuals to "bet on" the class action achieving certification and vindicating their claims without risking loss of those claims. *See Am. Pipe*, 414 U.S. at 553. That unnamed class members ignorant of their claims also benefit from *American Pipe* tolling has only limited inequitable effect because the incidental benefit is of limited duration. *Id.* at 561.

By contrast, the negative policy implications of *indefinite* tolling are myriad. Stacked tolling rewards foot-dragging by would-be class representatives. It takes the pressure off their lawyers to swiftly marshal and preserve evidence. It rewards unnamed class members who forgo the effort and cost of pursuing individual claims to prolong their risk-free ride on the class action train. *Cf. Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012) ("Allowing tolling to continue beyond the point at which the § 16(b) plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be *inequitable*[.]" (emphasis in original)). And it gifts non-diligent class members with the opportunity to belatedly discover and pursue stale claims or receive an unexpected windfall recovery if a class ever makes it to the finish line. A rule that incidentally and temporarily rewards those who failed to discover their claims within limitations may be compatible with equity, as the *American Pipe* Court found. A rule that lets them sit on their rights indefinitely, however, is not.

B. Stacked class actions harm businesses, including by significantly eroding the finality and certainty that statutes of limitation provide.

The Ninth Circuit's rule empowers class action lawyers to relitigate serially the class certification question regardless of statutory deadlines. One can hardly imagine a rule more "inconsistent with the

functional operation of a statute of limitations." *Am.* Pipe, 414 U.S. at 554; *see Credit Suisse*, 566 U.S. at 227–28 ("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 purposes of limitations periods in general."); *CalPERS,* 137 S.Ct. at 2054 (rejecting proffered interpretation of statute of repose to create limitless causes of action "reveals its implausibility," because "[t]aken to its logical limit, an individual action would be timely even if it were filed decades after the original" conduct underlying the claim). Extending *American Pipe* equitable tolling to indefinitely suspend a statute of limitations flouts "statutory intent" as much as extending it to statutes of repose, which the Court refused to do. *Id.* at 2050 (observing that statutes of repose reflect "statutory intent" to create an absolute time bar) (citing *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014); *cf. Artis*, (Gorsuch, J., dissenting) (explaining that creating time bars is "'one of the most sacred and important of sovereign rights and duties.'") (quoting *Hawkins v. Barney's Lessee*, 5 Pet. 457, 466 (1831)).

Statutes of limitation are a critical protection for businesses subject to class action lawsuits. Interfering with their operation does not just prejudice defendants by requiring them to defend against stale claims. It forces business defendants—i.e., the typical target of class actions—to keep contingent liabilities on their books without the ability to predict reliably when the risk may end. *Cf. McCann v. Hy-See, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011)

("[B]usiness planning is impeded by contingent liabilities that linger indefinitely.").

In a litigation environment where facing class actions is now the price of doing business, this uncertainty is a huge burden on companies and the economy. In the Mayer Brown study, of 148 class actions filed in or removed to federal court in 2009, 14 percent (21 cases) had not been resolved by early September 2013, leaving the defendants with unknown contingent liability for over three years. Mayer Brown at 5. This statistic is concerning enough to businesses managing litigation risk. But if winning a years-long battle on class certification merely paves the way for others to spring up in its place, the incentive to fight is reduced and the "hydraulic pressure" to settle increased. *Newton*, 259 F.3d at 163. As it stands, only 28% of companies have insurance coverage for class action defense, and those that do are covered for 30% or less. CARLTON SURVEY, *supra* n. 2 at 18. The per-matter spending per year on outside counsel ranges from $0.2 million to $1.5 million for routine matters, to $3 to 30 million for "bet the company" litigation. *Id*. at 17.

Stacked tolling would make it significantly harder for companies to assess future liabilities, plan defense costs, and manage litigation risk, with ill effects on the economy as a whole. Money put in reserve in anticipation of further litigation is money that is not spent on innovation and expansion, hiring new employees and increasing pay, and providing goods and services to consumers.

And the problem of stale claims takes on heightened significance when tolling may continue indefinitely. In *American Pipe*, the Court found that the problems of unfair surprise and lost evidence were minimized because, "[w]ithin the period set by the statute of limitations, the defendant has the essential information necessary to determine both the subject matter and size of the prospective litigation[.]" 414 U.S. at 554–55. The Ninth Circuit addressed the stale-claim concern in a single sentence, citing the discussion from *American Pipe*. Pet. App. 21a. It thereby disregarded the critical distinction between a limited tolling rule—as in *American Pipe*—and an indefinite one. Under the latter, the negative impact on the defendant's ability to vigorously defend itself continues to grow as memories progressively fade, witnesses move or pass away, and documents outside the control of the parties to the original suit get lost or destroyed. Fairness demands that "'the right to be free of stale claims'" at some point outweighs "'the right to prosecute them.'" *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *R.R. Tele.*, 321 U.S. at 349). Yet this fairness analysis was ignored.

This inevitable deterioration of evidence not only threatens the fairness of a trial on the merits, it may also skew the certification question in plaintiffs' favor. Evidence outside the control of the parties to the original class action may be critical. *See In re St. Jude Med., Inc.*, 522 F.3d 836, 840–41 (8th Cir. 2008) (concluding predominance factor was not met based on individual medical histories of class plaintiffs). Moreover, indefinite tolling itself makes it likely that the scope and contours of subsequent class actions—

perhaps filed a decade or more after the original statutory deadline—will differ, as lawyers hone their arguments and learn from their mistakes. The mutability of serial class claims that stacked class tolling invites undermines any credible argument that an initial class action puts the defendant on notice of the claims against it, or that an earlier class certification denial diminishes the risk of later certification on the second, third, or even fourth bite at that apple.

The Ninth Circuit dismissed these concerns in reliance on *Smith v. Bayer*, 564 U.S. 299 (2011). According to the Ninth Circuit, *Smith* establishes that the negative policy implications of serial relitigation of class certification are inevitable, negligible, and curable through nebulous doctrines like comity. Pet. App. 19a (["W]e follow the Supreme Court's lead and trust that existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of addressing these concerns"') (quoting *Phipps,* 792 F.3d at 653). This misreading of *Smith* is of serious concern to companies who depend on statutes of limitation in managing their business-litigation risk. *Smith* had nothing to do with statutes of limitation. The Court there declined to modify the *law of preclusion* to prohibit unnamed putative class members in a failed class action from relitigating the certification question. It observed that the policy concerns raised by serial relitigation of class certification were Bayer's "strongest argument[.]" *Id.* at 316. It rejected Bayer's policy argument not because it was weak, but because the policy concerns in the context of that case were insufficient grounds for

ignoring a central tenet of an established legal doctrine. *Id.* at 313, 316 (acknowledging that rule against nonparty preclusion "perforce leads to relitigation of many issues" as a function of its "fundamental nature").

This case stands on a different footing. Equitable tolling is an exception to rules of law; preclusion principles *are* rules of law. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (explaining that issue preclusion is well-established in the common law). *Smith*'s refusal to modify preclusion law based on policy concerns does not bear on whether a judge-made equitable rule should be expanded *despite* policy concerns. In *Shady Grove*, for example, the Court treated the forum-shopping its decision would cause as a necessary evil of Congress's decision to create "a uniform system of federal procedure." *Shady Grove*, 559 U.S. at 415–16. But an incentive to forum-shop would be "*unacceptable when it comes as the consequence of judge-made rules* created to fill supposed 'gaps' in positive federal law." *Id.* (emphasis added). Forum-shopping enabled by a judge-made rule of equity is equally unacceptable.

The Court in *Smith* raised—briefly and without discussion—*stare decisis* and comity as principles that could "mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." 564 U.S. at 317. It did not suggest, however, that these discretionary and elastic principles fully addressed the ill effects of serial relitigation in all contexts. *Stare decisis* and comity, in effect, were the best the *Smith*

Court could offer while adhering to its "'constrained approach to nonparty preclusion.'" *Id*. at 313 (quoting *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008)). That does not imply that these doctrines are adequate substitutes for statutes of limitation. And they are not. *See Smentek v. Dart*, 683 F.3d 373, 375 (7th Cir. 2012) (describing the *Smith* Court's reference to comity as "cryptic," and refusing to revise certification decision based on comity); *see also Ford v. Ford Motor Co.*, 2014 WL 12570925, at *3–4 (C.D. Cal. 2014) (agreeing that that the refence to comity in *Smith* is "cryptic"). The effectiveness of such doctrines in curbing serial relitigation is uncertain, at best.[8]

Far from supporting the rule adopted by the Ninth Circuit, *Smith*—which removes preclusion principles as a check on serial relitigation— illustrates

---

[8] We are aware of only four cases since *Smith* in which a district court has cited comity in denying class certification. *Ott v. Mortg. Inv'r Corp. of Ohio*, 65 F. Supp. 3d 1046, 1063–64 (D. Or. 2014); *Murray v. Sears, Roebuck, & Co.,* 2014 WL 563264 (N.D. Cal. 2014); *Williams v. Foods*, 2013 WL 4067594, at *2 (N.D. Cal. 2013); *Edwards v. Zenimax Media Inc.*, 2012 WL 4378219, at *4 (D. Colo. 2012). At least four courts have expressly declined to follow another court's previous class certification ruling. *See Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274 (W.D. Wash. 2012) (reversed by *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015) (reversed by *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017)); *Ford v. Ford Motor Co.*, 2014 WL 12570925, at *3–4 (C.D. Cal. 2014); *Heibel v. U.S. Bank Nat. Ass'n*, 2012 WL 4463771, at *4 (S.D. 2012); *In re Wells Fargo Wage & Hour Emp't Practices Litig. (No. III)*, 2012 WL 3308880, at *22 (S.D. Tex. 2012) (granting conditional class certification).

why it is so important for this Court to bar indefinite tolling of class actions.

C. Stacked class action tolling increases the abusive potential inherent in the class action device and promotes inefficiency.

Stacked class action tolling virtually guarantees increased strategic abuse of class actions. Class actions by their nature allow weak or spurious claims to be aggregated and "weaponized," pressuring defendants to buy peace rather than fight and risk losing. *E.g.*, *Newton*, 259 F.3d at 163. Justice Blackmun cautioned that *American Pipe* tolling of individual claims "must not be regarded as encouragement to lawyers" to file placeholder class actions "to attract and save members of the purported class who have slept on their rights." *Am. Pipe*, 414 U.S. at 561 (Blackmun, J. concurring). The Ninth Circuit paid no heed to this warning. Yet there is no limit to the abusive potential of which Justice Blackmun warned if the duration of tolling rests in the hands of the very lawyers he addressed.

The potential for abuse would be unacceptable even if stacked tolling furthered the goals of Rule 23, but it does not. The overriding theme of *American Pipe* and *Crown, Cork* is that early certification decisions streamline litigation, reduce costs, and discourage strategic delay. *See Am. Pipe*, 414 U.S. at 547 (observing that 1966 amendments precluded litigants from "await[ing] developments in the trial or even final judgment" before joining a class). These goals are

reflected in the directive that courts should rule at "[a]n early practicable time" after suit is filed. Fed. R. Civ. P. 23(c)(1)(A). *American Pipe* referred to this directive five times. *See id.* at 542 n.5, 547, 549, 552; *id* at 562 (Blackmun, J., concurring).

Under stacked class action tolling, the denial of class certification no longer produces certainty, even when a statutory deadline has long passed. That result does not effectuate economy of litigation under Rule 23—it undermines it.

What is more, it instead promotes efficiency to require those litigants who sincerely wish to serve as class representatives (and their lawyers) to enter the fray *before* limitations periods have run. Nothing stands in their way. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457 (7th Cir. 1997) (noting that unnamed class members can opt out, seek replacement, or intervene if they wish to assert control). The benefits of promptly determining class leadership is reflected in the "lead plaintiff" provision of the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u. Rather than waiting to see how matters develop, plaintiffs who wish to lead are encouraged to step up and assume fiduciary responsibilities, including loyalty to the interests of the class. *See In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 198 (3d Cir. 2005); *see also* James D. Cox et al., *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 Colum. L. Rev. 1587, 1587 (2006) ("Congress expected that [the lead plaintiff] would actively monitor the conduct of a securities fraud class action

so as to reduce the litigation agency costs that may arise when counsel's interests diverge from those of the shareholder class.").

A fixed statutory deadline has a similar salutary effect in a Rule 23 class action. Federal courts are well-equipped to settle disputes among litigants and lawyers vying for control, and can achieve economies through coordination and consolidation where appropriate. *See*, *e.g.*, Transfer Order, In re Volkswagen "Clean Diesel" Mktg. Sales Practices & Prod. Liab. Litig., MDL No. 2672, (J.P.M.L. Dec. 8, 2015), ECF No. 950. Even if multiple class actions proceed at the same time, a fixed deadline temporally limits any inefficiency. Requiring the timely assertion of class claims discourages shoddy lawyering by taking away the safety net of perpetual tolling. And it raises the likelihood that courts evaluating motions to certify, and juries deliberating the merits in certified class actions, will make their decisions based on the best evidence, gathered before "'memories have faded, and witnesses have disappeared.'" *Burnett*, 380 U.S. at 428 (1965) (quoting *R.R. Tele.*, 321 U.S. at 348).

***

Equitable exceptions to legal rules should relieve injustice, not promote it. There is no injustice in holding would-be class representatives to a statutory deadline. *Amicus curiae*'s members daily represent businesses defending against class action litigation. From their perspective, letting tardy litigants use the class action device to circumvent statutes of limitation—creating risk exposure of

indefinite scope and duration for the business community—works no equity.

CONCLUSION

The Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

JOHN F. KUPPENS
President,
DRI–THE VOICE OF THE DEFENSE BAR
55 West Monroe St.
Chicago, IL 60603
(312) 795-1101

ROBERT L. WISE
Counsel of Record
BOWMAN AND BROOKE LLP
901 East Byrd Street
Suite 1650
Richmond, VA 23219
(804) 649-8200
Robert.Wise@bowmanandbrooke.com

SUSAN E. BURNETT
BOWMAN AND BROOKE LLP
2901 Via Fortuna Drive
Suite 500
Austin, TX 78746

Counsel for Amicus Curiae

January 26, 2018