No. 17-432

IN THE

Supreme Court of the United States

CHINA AGRITECH, INC.,
Petitioner,

v.

MICHAEL H. RESH, ET AL.,
Respondents.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are law professors who teach and write in the field of federal courts, civil procedure, and constitutional law who have an interest in the proper interpretation of equitable tolling and class action doctrine. Indeed, several *Amici* are leading experts regarding tolling in the class action context. *Amici* come together out of a shared belief that the Ninth Circuit correctly held equitable tolling applicable in this successive class action case. *See generally Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

In particular, *Amici* Law Professors conclude that equitable tolling in this case comports with congressional intent regarding 28 U.S.C. § 1658(b)(1), a point not addressed by Petitioner and its *amici*. *Amici* Law Professors also contend that Petitioner and its *amici*'s many securities-law-only-focused arguments fail to account for the transsubstantive nature of Federal Rule of Civil Procedure 23.

SUMMARY OF ARGUMENT

This case asks whether Congress intended equitable tolling to apply to 28 U.S.C. § 1658(b)(1) in successive class filings. The answer is a resounding "Yes."

I.A. "It is hornbook law that limitations periods," such as § 1658(b)(1), "are customarily subject to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from counsel for both petitioner and respondents granting blanket consent to the filing of *amicus* briefs are on file with the Clerk.

equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal citations and quotation marks omitted). Furthermore, the Court has previously held that Congress intends § 1658(b)(1) be interpreted in light of common law adjudicatory principles, such as equitable tolling doctrine. *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010). Petitioner's view, which limits equitable tolling, cannot square with this presumed congressional intent.

I.B. Petitioner cannot carry its burden to counter this strong presumption favoring equitable tolling of § 1658(b)(1) for successive class filings. The Court requires the "'clearest command'" from Congress to render a statute immune to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 646 (2010) (citation omitted). Section 1658(b) lacks such a clear command.

I.C. Section 1658(b)(2)'s text forestalls Petitioner's primary fear that equitable tolling imposes an infinite regress of successive class action filings upon them. Congress included a five-year statute of repose in § 1658(b)(2). Statutes of repose, like § 1658(b)(2), "are not subject to equitable tolling." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017). Therefore, the statute itself absolutely bars a successive suit five years after § 1658(b)(2) begins to run.

I.D.1. Petitioner fails to rebut the conclusion that successive class members act diligently. First, Petitioner erroneously treats diligence as a necessary element of equitable tolling, rather than a consideration to be weighed. *See ANZ Sec.*, 137 S. Ct. at 2052 (treating diligence as a consideration, not an element). This conflation of "considerations" to be weighed with "elements" that must be met undercuts Petitioner's view.

I.D.2. Second, Petitioner relies upon *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962), as binding authority for its one-shot approach. *Goldlawr*, however, is a transfer-of-venue opinion. 369 U.S. at 464.

I.D.3. Third, Petitioner attempts to construe the happenstance that under the *facts* in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the relevant statute of limitations was tolled so that those plaintiffs could file individual actions into a no-successive-class-filing *rule of law*. "Supreme Court opinions," however, are not limited "precisely to the facts of each case . . . [because] our system of jurisprudence would be in shambles, with litigants, lawyers, and legislatures left to grope aimlessly for some semblance of reliable guidance." *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991). Indeed, this Court in *Crown, Cork & Seal* did not limit *American Pipe*'s scope to motions to intervene, which were the particular facts at issue in that case.

II.A. Petitioner and its *amici* often rely upon securities-litigation specific contentions in crafting their anti-tolling approach. This constitutes error because the Federal Rules of Civil Procedure are transsubstantive. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1108 (1982). The nature of the Rules, then, renders these securities-specific arguments inapt.

II.B. Lastly, if Petitioner and its *amici*'s real position is that class actions have not "benefitted consumers" and "impose significant costs on businesses," DRI Br. 10, they should ask the Civil Rules Advisory Committee to amend Rule 23. *See Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding in a Rules case that "'[w]hatever temptations the statesmanship of policy-making

might wisely suggest,' the judge's job is to construe the statute—not to make it better.") (citation omitted).

ARGUMENT

I. CONGRESSIONAL INTENT REGARDING § 1658(b) IS THE FUNDAMENTAL ISSUE HERE AND COMPELS EQUITABLE TOLLING.

This case asks the Court to decide whether and when equitable tolling applies to 28 U.S.C. § 1658(b)(1). Tellingly, Petitioner carefully avoids any mention of § 1658(b)(1) in its argument.[2] Why? Because Petitioner's one-shot approach to class action membership—in which the limitations period set forth in § 1658(b)(1) could not be equitably tolled to allow membership in a successive class, *see, e.g.*, Pet. Br. 23—cannot be squared with the statute. Yet, congressional intent demands the application of equitable tolling principles to the two-year statute of limitations embodied in § 1658(b)(1).

A. This Court Strongly Presumes Equitable Tolling Doctrine Applies To § 1658(b)(1) As A Matter Of Congressional Intent.

Congressional intent excludes Petitioner's one-shot approach to equitable tolling for class members. This Court holds that the "basic inquiry" of equitable tolling is one of legislative intent. *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 427 (1965) ("The basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in the given circumstances."); *see also Am. Pipe & Constr. Co. v. Utah*,

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[2] Petitioner cites § 1658 but three times, *see* Pet. Br. 1, 5, 7—all in the background discussion. Never once does Petitioner engage with the statute at issue in this case in the "Argument" section of its brief. Petitioner's *amici* similarly ignore the operable statute in this case.

414 U.S. 538, 557–58 (1974) ("The proper test . . . is whether tolling the limitation in a given context is consonant with the legislative scheme."). This Court determines congressional intent, including intent regarding equitable tolling, with an "interpretive inquiry [that] begins with the text and structure of the statute." *Alexander v. Sandoval*, 532 U.S. 275, 288 n.7 (2001).

The relevant statute is 28 U.S.C. § 1658(b). This statute follows a familiar pattern of pairing a shorter limitations period with a longer repose period. Thus, Congress first crafted a two-year statute of limitations for securities-fraud cases. 28 U.S.C. § 1658(b)(1) ("[A] private right of action that involves a claim of fraud . . . concerning the securities laws . . . may be brought not later than . . . 2 years after the discovery of the facts constituting the violation."); *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) (finding the two-year time limit in § 1658(b)(1) a statute of limitation). And next Congress paired subsection (b)(1)'s statute of limitations with a five-year statute of repose. 28 U.S.C. § 1658(b)(2) ("[A] private right of action that involves a claim of fraud . . . concerning the securities laws . . . may be brought not later than . . . 5 years after such violation."); *Merck & Co.*, 559 U.S. at 650 (holding the five-year time limit in § 1658(b)(2) a statute of repose); *see also Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017) (affirming *Merck & Co.*'s construction of § 1658(b)).

Given its text and structure, this Court should hold § 1658(b) subject to equitable tolling as a matter of congressional intent—contrary to Petitioner's one-shot approach. "It is hornbook law that limitations periods," such as § 1658(b)(1), "are customarily subject to equitable tolling, unless tolling would be

inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal citations and quotation marks omitted). This hornbook rule follows because Congress "'legislates against a background of common-law adjudicatory principles,'" including "[e]quitable tolling, a long-established feature of American jurisprudence." *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)) (alteration omitted).[3]

The hornbook rule applies here. This Court previously held that Congress intends § 1658(b)(1) to be interpreted against the backdrop of common law adjudicatory understandings. In *Merck & Co.*, the Court ruled that when Congress deployed "discovery" in § 1658(b)(1), it intended the common law meaning of the term. 559 U.S. at 648. It follows, *and Petitioner does not contest*, that Congress intended the application of similar common law adjudicatory principles, such as equitable tolling, to the construction of § 1658(b)(1).

B. Section 1658(b) Lacks The Required Clear Statement Disclaiming Equitable Tolling To Overcome This Strong Presumption.

Petitioner bears the burden to overcome this strong presumption that equitable tolling applies to § 1658(b)(1), whether once or successively. To surmount this strong presumption that Congress intends

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[3] *See also United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1636 (2015) (interpreting the statute of limitations' language to allow equitable tolling); *Young*, 535 U.S. at 49–50 ("Congress must be presumed to draft limitations periods in light of this background principle."); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349–50 (1875) (applying equitable tolling to statute of limitation in the bankruptcy code).

equitable tolling to apply, this Court requires great clarity in the statutory text expressing a contrary intent. "[W]e will 'not construe a statute to displace courts' traditional equitable authority absent the 'clearest command.'" *Holland v. Florida*, 560 U.S. 631, 646 (2010) (quoting and applying *Miller v. French*, 530 U.S. 327, 340 (2000), in an equitable tolling case). Section 1658(b) lacks such a clear congressional statement rejecting equitable tolling—an uncontested conclusion that stymies Petitioner's one-shot approach.

Moreover, Congress could well have included such a clear statement, if it intended to reject the traditional common law adjudicatory principle of equitable tolling in either one-off or successive settings. Congress enacted § 1658 in 1990 and reinstated the provision (in amended form, creating subsections (a) and (b)) in 2002. *See* Pub. L. No. 101-650, tit. III, § 313(a), 104 Stat. 5104, 5114 (1990); Pub. L. No. 107-204, tit. VIII, § 804(a), 116 Stat. 800, 801 (2002). Both of these congressional actions occurred well after the Court's decisions in *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), putting Congress on notice as to this Court's jurisprudence regarding equitable tolling in class actions.

Until Congress instructs otherwise, there is nothing in § 1658(b) constituting the "clear statement" this Court requires to overcome the finding that Congress intends equitable tolling apply to § 1658(b)(1). *Cf. United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015) ("[I]n amending [the statute of limitations] four times after its enactment, Congress declined again (four times over) . . . to provide anything like the clear statement this Court has demanded before deeming a statute of limitations to curtail a court's power."). Petitioner does not, *because it cannot*, point the Court to

any congressional clear statement that disclaims application of equitable tolling to § 1658(b)(1), despite the fact that its one-shot approach does not comport with equitable tolling in the class action setting.

C. Section 1658(b)(2) Bars Petitioner's Imagined Infinite Series Of Successive Class Filings.

Attention to the text also shows that Congress crafted § 1658(b) to address Petitioner's primary fear. Petitioner and its *amici* object to successive tolling of class actions because they suppose class defendants will face an infinite regress of successive class-action filings. *See* Pet. Br. 46–48; DRI Br. 6–11; SIFMA Br. 16–18; Chamber Br. 9–13. Petitioner and its *amici*'s boogeyman arguments err, however, because they ignore the plain text and import of § 1658(b)(2).

The plain text of the statute bars an infinite regress of successive class-action filings. Congress coupled § 1658(b)(1)'s two-year statute of limitations with a five-year statute of repose in § 1658(b)(2). *See Merck & Co.*, 559 U.S. at 650 (holding that § 1658(b)(2) is a statute of repose). This Court recently held that "statutes of repose," like § 1658(b)(2), "are not subject to equitable tolling." *ANZ Sec.*, 137 S. Ct. at 2051. Under no circumstances, then, could class plaintiffs file infinite successive class actions. The statute absolutely bars suits five years after a violation—*a time limit that the courts cannot toll.*

Furthermore, in *Merck & Co.*, this Court rejected a nearly identical argument to Petitioner's. 559 U.S. 633. The defendant in *Merck & Co.* protested against interpreting § 1658(b)(1) in light of the traditional common law adjudicatory principles, and feared that applying such a traditional common law interpretive tool to § 1658(b)(1) would increase costs by subjecting

it to "liability for acts taken long ago." *Id.* at 650; *see also* Pet. Br. 42–45 (asserting that successive tolling will unfairly increase defendants' costs); DRI Br. 18–25 (same); SIFMA Br. 6–10 (contending that successive tolling of class actions encourages more securities suits). This Court easily dismissed this hyperbolic contention by noting that "Congress' inclusion in the statute of an unqualified bar on actions instituted '5 years after such violation,' § 1658(b)(2), giving defendants total repose after five years, should diminish that fear." *Merck & Co.*, 559 U.S. at 650.

The same reasoning controls here. Petitioner's infinite refiling position, leading to ballooning costs, is little more than a scary campfire story. Congress barred just such a result as Petitioner imagines by including a statute of repose. *See Merck & Co.*, 559 U.S. at 650. As such, only a clear statement from Congress prohibiting equitable tolling can stop its application to § 1658(b)(1). *See Kwai Fun Wong*, 135 S. Ct. at 1633; *Holland*, 560 U.S. at 646; *Miller*, 530 U.S. at 340. Petitioner's parade of horribles, ignoring the plain text of § 1658(b)(2) as it does, offers no substitute for the application of the venerable plain-statement rule.

D. Petitioner Cannot Rebut The Conclusion That Successive Class Members Act Diligently Under *American Pipe*.

1. Petitioner Misconstrues Diligence As An Immutable And Inflexible Element Of Equitable Tolling.

Petitioner cannot counter the conclusion that equitable tolling applies to § 1658(b)(1) in successive class actions.

As a first attempt to escape this conclusion, Petitioner erroneously presents plaintiff diligence as a

necessary element to toll § 1658(b)(1) in securities cases. *See* Pet. Br. 31 (characterizing *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750 (2016), as holding "diligence and extraordinary circumstances . . . 'elements' of equitable tolling that must both be satisfied"). Petitioner's characterization of equitable tolling doctrine tracks the test laid out in *Holland*. 560 U.S. at 649 ("[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing.").

In *Menominee*, however, the Court explicitly stated that "*Holland v. Florida* [was] a habeas case, and we have never held that its equitable-tolling test necessarily applies outside the habeas context." 136 S. Ct. at 756 n.2. The Court continued, "[w]e have no occasion to decide whether an even stricter test [or] . . . a more generous test than *Holland*" could apply outside the habeas context. *Id.* This Court reiterated in *ANZ Securities* that diligence and extraordinary circumstance are "considerations" in the equitable tolling analysis, not necessary elements as Petitioner wrongly frames them. 137 S. Ct. at 2052.

This distinction in application tracks congressional intent. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress sought "to eliminate delays in the federal habeas review process." *Holland*, 560 U.S. at 648. The *Holland* Court, therefore, took an elements approach to diligence in the equitable tolling analysis of AEDPA's statute of limitations, 28 U.S.C. § 2244(d). 560 U.S. at 649. Here, by contrast, Congress predicated its 1995 securities-litigation reforms upon the premise that securities litigation would proceed via class action. *See* 15 U.S.C.

§ 77z-1(a)(1) (limiting key securities-litigation reforms to class actions). Indeed, Congress' key reform, heightened pleading standards, applies only to class actions. *See* 15 U.S.C. § 78u-4(a)(1). Thus, the tolling analysis for the securities-litigation statute of limitation at issue here, § 1658(b)(1), should promote class actions over individual filings by construing diligence as but a consideration, not an element.

This conflation of considerations to be weighed with elements that must be met undercuts Petitioner's view that diligence cannot be found here as a matter of law. Contrary to Petitioner's assumptions, "equity[] resist[s] . . . rigid rules," *Holland*, 560 U.S. at 651, especially in the "fact-intensive disputes" involved in equitable tolling, *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 229 (2012). Following these principles, *American Pipe*'s class action tolling rule aligns well with the purposes of equitable tolling. Indeed, *American Pipe*'s non-rigid approach "demonstrate[s] . . . that a person not a party to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding." *Smith v. Bayer Corp.*, 564 U.S. 299, 314 n.10 (2011).

2. Petitioner Wrongly Relies Upon A Transfer-Of-Venue Case In An Attempt To Dodge The American Pipe *Rule.*

Facing this precedential brick wall, Petitioner acknowledges that diligence is shown for equitable tolling purposes by way of class membership in an initial action. *See* Pet. Br. 34. Petitioner cannot explain, however, why serving as a class member constitutes diligence in a first suit, but not in a successive action.

Indeed, Petitioner and its *amici* cite no binding authority after *American Pipe* for the notion that successive class membership does not constitute diligence.

See Pet. Br. 34; Chamber Br. 12–13; DRI Br. 16–17. Rather, Petitioner cites only *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962), as authority for its novel position that successive class membership shows a lack of diligence. *See* Pet. Br. 34.

Goldlawr, which predates *American Pipe* by 12 years, is not a successive class action case, or even a one-time class action case. Rather, *Goldlawr* is a transfer-of-venue opinion, addressing whether a district court lacking personal jurisdiction may transfer a suit pursuant to 28 U.S.C. § 1406. 369 U.S. at 464. In short, *Goldlawr* does not stand for the "successive tolling equates to a lack of diligence" proposition Petitioner asserts.

3. Petitioner Mistakenly Presents The Facts Of Crown, Cork & Seal *As A Rule Of Law.*

In lieu of an argument on the law, Petitioner makes much of the happenstance that in *Crown, Cork & Seal* the relevant statute of limitations was tolled so that those particular plaintiffs could file individual actions. *See* Pet. Br. 26, 28–31, 34, 38, 45, 47. This Court has also noted those facts when alluding to *American Pipe* and *Crown, Cork & Seal*. *See ANZ Secs*., 137 S. Ct. at 2054–55; *Bayer Corp*., 564 U.S. at 313 n.10; *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990).

But this Court's holdings are seldom limited to the precise facts of the case in which the rule was delivered as Petitioner supposes. Indeed, "Supreme Court opinions [are not limited] precisely to the facts of each case . . . [because] our system of jurisprudence would be in shambles, with litigants, lawyers, and legislatures left to grope aimlessly for some semblance of reliable guidance." *McCoy v. Mass. Inst. of Tech*., 950 F.2d 13, 19 (1st Cir. 1991); *see also Am. Civil*

Liberties Union of Ky. v. McCreary County, 607 F.3d 439, 447 (6th Cir. 2010) (adopting *McCoy*); *Oyebanji v. Gonzales*, 418 F.3d 260, 265 (3d Cir. 2005) (same); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (same); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) (same).

Following the principle that the Court's opinions generally are not limited to their precise facts, this Court in *Crown, Cork & Seal* did not limit *American Pipe*'s scope to motions to intervene. Nor should the Court today narrowly limit equitable tolling to the facts presented in *Crown, Cork & Seal*, because, just as in *Crown, Cork & Seal*, the *principles* undergirding *American Pipe* continue to apply.

* * *

There is no room for doubt. Congressional intent wholeheartedly supports application of equitable tolling doctrine to § 1658(b)—a conclusion incompatible with Petitioner's one-shot approach to tolling class actions.

II. THE TRANSSUBSTANTIVE NATURE OF RULE 23 VOIDS PETITIONER'S MANY SECURITIES-LAW-FOCUSED CONTENTIONS.

A. As *Amici* Law Professors demonstrate above, this case presents the Court with a question of congressional intent regarding § 1658(b)(1). Petitioner and its *amici*, however, frame this case as a Federal Rule of Civil Procedure 23 issue. *See* Pet. Br. 35–42; Chamber Br. 17–19; DRI Br. 11–14; SIFMA 11–18. Even if this Court approaches this suit fundamentally as a Rule 23 question, Petitioner and its *amici*'s arguments fail.

Petitioner and its *amici*'s Rule 23 arguments err when they rely upon securities-litigation-specific

contentions. *See, e.g.*, Pet Br. 36–37 (arguing that there is a particular lack of diligence for successive class members in securities litigation); DRI Br. 6–11 (asserting that successive tolling amounts to unfair betting by securities-fraud plaintiffs); SIFMA Br. 6–10 (speculating that successive tolling encourages securities suits); WLF Br. *passim* (making various policy assertions regarding securities-fraud suits). These arguments' unspoken premise is that this Court construes Rule 23 differently depending on the subject matter of the litigation. On the contrary, Rule 23 is a general procedural rule, not a subject-specific rule. *See Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010) ("Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met.").

Indeed, all of the Federal Rules of Civil Procedure are transsubstantive. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1108 (1982); Charles E. Clark & James William Moore, *A New Federal Civil Procedure I, The Background*, 44 YALE L.J. 387, 388–89 (1935). As such, this Court does not vary Rule 23 interpretations for securities cases or any other substantive area of the law. Instead, Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove*, 559 U.S. at 398; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (rejecting the notion that the interpretation of Rule 8(a)(2) in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), applies only to complex anti-trust cases: "Rule [8(a)(2)] in turn governs the pleading standard in all civil actions . . . . Our decision in *Twombly* expounded the pleading standard for all civil

actions.") (internal citations and quotation marks omitted).

As such, Petitioner and *amici* err by assuming that securities-law-focused arguments provide a reason to reject the generally applicable *American Pipe* rule. Adopting any other result would be inconsistent with the very notion that the Rules are transsubstantive and, if followed, would lead the Court into an abyss of never-ending factual and substantive law variations, all in the guise of interpreting Rule 23 in one context and then the other. *Cf.* Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 GEO. MASON L. REV. 339, 349 (2016) (discussing the appropriate application, and necessity, of *American Pipe* tolling to successive class filings in the wake of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)—a de-certified, nationwide, employment-law class action). Indeed, this Court's commitment to crafting a general set of rules unrelated to substantive law places it in the stronger position of "avoiding 'interest group' politics," exactly of the stripe seen here. Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 303–04. As such, the Court should reject Petitioner's invitation to backtrack on its commitment to transsubstantive application of the Rules.

B. Finally, if Petitioner and its *amici*'s real position is that class actions have not "benefited consumers" and "impose significant costs on businesses," DRI Br. 10, there is a rulemaking process available for them to seek amendments to the rules. This Court, however, should not be beguiled into amending Rule 23 under the ruse of interpretation.

As the Court has often noted, the rulemaking process is the more appropriate setting for instituting

policy-based amendments to the Rules. "[T]he rulemaking process has important virtues. It draws on the collective experience of bench and bar, see 28 U.S.C. §2073, and it facilitates the adoption of measured, practical solutions." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009).

Moreover, policy change by way of rulemaking better comports with congressional intent than does policy change by judicial decision. *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995) (recognizing a congressional preference for rulemaking in the context of the finality rule for appellate jurisdiction); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1141–52 (2002) (arguing that the terms of delegated rulemaking authority in the Rules Enabling Act limit Rule amendment power to the rulemaking process). Furthermore, Congress itself plays an important role in the rulemaking process. *See* 28 U.S.C. § 2074(a); *Shady Grove*, 559 U.S. at 400 ("Congress . . . has ultimate authority over the Federal Rules of Civil Procedure . . . ."). The Court, as such, does not substitute the policy preferences of a party, or an *amicus*, for that of Rules Advisory Committee or Congress. *See Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding in a Rules case that "'[w]hatever temptations the statesmanship of policy-making might wisely suggest,' the judge's job is to construe the statute—not to make it better.") (citation omitted).

These points especially apply when, as here, arguments rest largely upon legislative facts. *See* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1217 (2012). Petitioner and *amici* make broad empirical claims about

financing securities lawsuits, *see* Pet. Br. 44; incentives to settle, *see* Pet. Br. 44, SIFMA Br. 10–11; judicial burdens, *see* Chamber Br. 19–20, DRI Br. 25–27; and costs to the business community, *see* DRI Br. 18–25. Whether Petitioner's arguments are viable largely depends upon empirical matters such as statistical rates of settlement after de-certification and similar determinations. These arguments more appropriately sound before the Civil Rules Advisory Committee.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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