No. _____

In The Supreme Court of the United States

PATSY WEATHERLY; EDITH WICHMAN; MICHELLE MORRISON; FELIX BRAVO; JON HANNA, et al.,

Petitioners,

v.

PERSHING, L.L.C.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The plaintiffs in these lawsuits are individuals who were swindled out of large sums of money in one of the largest "Ponzi" schemes in American history. Convicted financier Allen Stanford, now serving a 110-year prison term, sold billions of dollars' worth of bogus certificates of deposits to unwitting investors, many of them retirees seeking "safe" investments for their life savings, paying each new investor-victim "profits" out of funds solicited from newly duped investor-victims.

The plaintiffs were initially part of a class action suit seeking recovery, but each of them decided to leave the class and sue on their own. Years later, the district court denied certification of the putative class.

Thus, the questions presented are:

1. Whether in a class action filed in federal court based on diversity jurisdiction, the tolling rule of *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974), applies, as the Eighth Circuit has held, or whether state tolling law applies as the Fifth Circuit ruled in this case and as the Second, Fourth, Sixth, Seventh, and Ninth Circuits have held.

2. If federal tolling applies, whether tolling occurs when a plaintiff brings an individual action before the district court has ruled on the class certification question, as the Second, Ninth, and Tenth Circuits have ruled, or whether tolling does not apply as the First and Sixth Circuits have ruled.

PARTIES TO THE PROCEEDINGS

Petitioners, who are plaintiffs in this proceeding, are:

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Rosa P. Bermudez
Anahis Bolivar
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Felix Bravo
Manoj Chatlani
John Doe
Jorge Egoavil
Jon Hanna
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Robert Legault
Norberto Malcotti
Michelle Morrison
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Eduardo Roe
Oscar Salazar
Carmen Sanchez
Raul Sanchez
Miguel A. Serrani
Juan Carlos Valencia
Gilbert Villaverde
Patsy Weatherly
Edith Wichman
Mauricio Bigit
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Martha Blanchet
Ethel Bronstein
Jose Luis Cabrera
Tulio Capriles
Maria Teresa Cellini
Elba de la Torre
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Roberto Dumont
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Mario Ferrufino Alba
Ruben Mario Ferrufino Goitia
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Gina de Umana
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John Sacco
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Mai Ragnhild
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Eduardo Elias Miguel Giha
Jose Antonio Miguel Bandek
Salvador Perez Gavilan
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Jose Adolfo Rubio
Maria Teresa Olmos
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Jenny Saca
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Margarita Velez
Anabella Viaud
Luis Arturo Vidal
Jesus Villamizar
Ana Gonzalez
Antonio Zacarias

Respondent, who is defendant in these proceedings, is:

Pershing, L.L.C.

RELATED CASES

Weatherly v. Pershing, Civil Action No. 3:14-CV-0366-N, United States District Court, N.D. Texas, Dallas Division (opinion published at 322 F.Supp.3d 746 (N.D. Tex. 2018)).

Weatherly v. Pershing, No. 18-11052, Consolidated with 18-11053, Consolidated with 18-11056, Consolidated with 18-11057, Consolidated with 18-11072, Consolidated with 18-11087, United States Court of Appeals for the Fifth Circuit (opinion published at 945 F.3d 915 (5th Cir. 2019)).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Patsy Weatherly, et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 945 F.3d 915 (5th Cir. 2019), and is reproduced at the Appendix (App.) 3-27. The decision of the United States District Court for the Northern District of Texas is reported at 322 F.Supp.3d 746 (N.D. Tex. 2018) and is reproduced at App. 28-43.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Fifth Circuit entered judgment on December 19, 2019, affirming the judgment of the District Court. App. 1. This petition is filed within 90 days of the Fifth Circuit's ruling and is therefore timely under Rules 13.1 and 29.2 of this Court.

STATEMENT OF THE CASE

These six consolidated cases arise from the Stanford Ponzi scheme, the second-biggest investor fraud in United States history. Convicted financier Allen Stanford, now serving a 110-year prison term, sold billions of dollars' worth of bogus certificates of deposits to unwitting investors, many of them retirees seeking "safe" investments for their life savings, paying each new investor-victim "profits" out of funds solicited from newly duped investor-victims. Stanford oversaw a sprawling international financial empire. And a phony one. App. at 3.

Stanford used all of his entities, including Stanford Group Company (SGC), to perpetrate the fraudulent scheme through Stanford International Bank, Ltd. (SIBL). Plaintiffs–Petitioners purchased what they thought were low-risk certificates of deposits from SIBL. Defendant–Appellee, Pershing, provided clearing services for SGC.

The plaintiffs in these suits were initially part of a putative class action in *Turk v. Pershing, LLC*, No. 9-02199 (N.D. Tex. Nov. 18, 2009), which alleged that Pershing, as Stanford's clearing agent, (1) "was aware or should have been aware of Stanford's scheme" and (2) profited from Stanford's shady dealings. *Turk* had a putative nationwide class of all persons who bought Stanford CDs. There is no dispute that this class action suit was filed in a timely manner.

But the plaintiffs decided to leave the *Turk* class and sue on their own. They were wise to do so: several

years after they filed their own suits, the district court decided not to certify the *Turk* class. The question is whether there was tolling of the statute of limitations for the plaintiffs' claims while they were part of the *Turk* putative class action, including the time before the district court ruled on the class certification issue.

The plaintiffs filed *Weatherly*, the first of these cases, on November 20, 2013, and the other five cases were filed between January 28, 2015, and February 2, 2015—all in the Southern District of Florida. The cases were filed in federal court pursuant to diversity jurisdiction. The cases were transferred to the Northern District of Texas pursuant to an order of the Judicial Panel on Multidistrict Litigation. All of the litigation against Stanford and his alleged accomplices has been consolidated before the Northern District of Texas in MDL No. 2099.

The Plaintiffs allege that Pershing aided and abetted Stanford's breach of its fiduciary duty and committed fraud under Florida law. The complaints in all six lawsuits allege that Stanford used Pershing—a subsidiary of the Bank of New York Mellon—not only to provide back-office services for Stanford's brokerage firm, but also to buttress the credibility of his scheme and to recruit brokers who sold his CDs to investors. *See* Record on Appeal (ROA) 879-880. The complaints allege that Pershing was aware or should have been aware of Stanford's scheme, that Pershing profited from the scheme, and that Pershing's conduct and actions defrauded the plaintiffs and aided and abetted Stanford's

illegal conduct in violation of Florida law. *See*, *e.g.*, ROA.878; ROA.906; ROA.909; ROA.1343-1352.

The district court entered summary judgment in favor of Pershing against all of the plaintiffs based on the statute of limitations. *See* ROA.1250; ROA.11157; ROA.27878; ROA.22132; ROA.27759; ROA.19386. There is no dispute that the relevant limitations period is Florida's four-year period. *See* ROA.1242. The district court assumed for purposes of its summary judgment ruling that the statute began running for all the plaintiffs on November 18, 2009; on that date, the class action complaint was filed against Pershing in *Turk*. *See* ROA.1243.

If there was no tolling of the statute of limitations for the time during which the plaintiffs were part of the *Turk* class action, all six complaints were filed late. The first complaint—*Weatherly*—was filed on November 20, 2013—four years and two days after the statute began running—and the other five complaints were filed on January 28, 2015 (*Diaz* and *Powell*), and February 2, 2015 (*Bronstein*, *Hawk*, and *Espinosa*). *See* ROA.679; ROA.7093; ROA.11174; ROA.15525; ROA.19400; ROA.22145.

The plaintiffs argued that they were entitled to tolling while they were putative members of the *Turk* class and while the district court stayed the *Turk* litigation from September 30, 2011, until May 21, 2012, pending an appeal in a related case from the same MDL. *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012). *See* ROA.6368-6369.

The district court rejected these arguments. The court assumed that Florida law governed the question of tolling and then held that Florida did not recognize either class action tolling or tolling during a stay. *See* App. 33-36. The United States Court of Appeals for the Fifth Circuit affirmed. *See* App. 19-24.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. This Court Should Grant Certiorari to Resolve a Split Among the Circuits and an Issue of National Importance as to Whether the Tolling of a Class Action Suit Filed in Federal Court Pursuant to Diversity Jurisdiction is Governed by this Court's Decision in *American Pipe & Construction Co. v. Utah* or by State Law.

In *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974), this Court addressed the question of the tolling of a statute of limitations in a class action suit. The Court held that when class action status has been denied for failure to demonstrate that "the class is so numerous that joinder of all members is impracticable," commencement of the original class suit tolls the running of the statute of limitations for all purported members of the class who file a motion to intervene in a timely manner. *Id*. at 552-53.

The Court concluded that tolling the applicable statute of limitations during the course of a party's

participation in a federal class action would prevent the "needless duplication of motions" and would be "protective filings by parties seeking to preserve their rights during the pendency of the class action." *Id*. at 553-54. This Court explained: "Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case. It follows that even as to asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment." *Id.* at 552.

This holding was extended in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), where this Court held that filing a class action tolls the running of statute of limitations to absent class members who, after denial of class certification, choose to file individual actions. The issue was "whether the filing of a class action tolls the applicable statute of limitations, and thus permits all members of the putative class to file individual actions in the event that class certification is denied, provided, of course, that those actions are instituted within the time that remains on the limitations period." *Id.* at 346-47. The Court rejected the argument that *American Pipe* is limited to intervenors and does not toll the statute of limitations for class members who file actions of their own. The Court concluded:

"While *American Pipe* concerned only intervenors, we conclude that the holding of that case is not to be read so narrowly. The filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' not just as to intervenors." *Id.* at 350.

The plaintiffs in both *American Pipe* and *Crown* filed suits under federal law, the Sherman Act and The Civil Rights Act of 1964, respectively. The question that this Court has never addressed—and that is presented in this case—is whether a federal court sitting in diversity jurisdiction should apply *American Pipe* tolling or tolling under state law.

Under *American Pipe*, there would have been tolling of the plaintiffs' claims during the time that they were part of the putative *Turk* class action. Their cases would not be time barred. But the Fifth Circuit in this case held that Florida state tolling law controls and therefore the lawsuits are time barred. The Fifth Circuit declared: "Because the Investors filed these cases in federal court in Florida, we apply Florida substantive law to the question of whether the Investors' presence in the *Turk* lawsuit tolled the statute of limitations for their claims in this case." 945 F.3d 915, 920, App. at 8.

There is a clear split among the Circuits as to whether *American Pipe* controls tolling in class actions filed in federal court based on diversity jurisdiction or whether state law should be applied. Several Circuits have come to the same conclusion as the Fifth Circuit in this case and have applied state tolling law. *See*

Casey v. Merck & Co., 653 F.3d 95, 100 (2d Cir. 2011); *Wade v. Danek Med., Inc.*, 182 F.3d 281, 289 (4th Cir. 1999); *Wyser-Pratte Mgmt. Co. v. Telxon Corp*., 413 F.3d 553, 567 (6th Cir. 2005); *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 265 (7th Cir. 1998); *Albano v. Shea Homes Ltd. Partnership*, 634 F.3d 524, 530 (9th Cir. 2011).

But in sharp contrast, the Eighth Circuit has come to the opposite conclusion and said that federal law should apply. In *Adams Pub. Sch. Dist. v. Asbestos Corp.*, 7 F.3d 717, 718-19 (8th Cir. 1993), the court viewed "the federal interest here [discussed in *American Pipe*] as sufficiently strong to justify tolling in a diversity case where the state law provides no relief." The Eighth Circuit reaffirmed this proposition in *In re General American Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 915 (8th Cir. 2004), holding that federal interest in "efficiency and economy of the class-action procedure" outweighs any state interest and "justifies tolling in diversity cases where the otherwise-applicable state law provides no relief." *Id.* at 915.

Quite clearly, if the statute of limitations issue in this case had been addressed in the Eighth Circuit, this case would be deemed timely and would proceed. There is great inequity and unfairness when the statute of limitations is tolled for some putative class members, but not for other members of the very same putative class based on the happenstance of which Circuit they live in. In fact, in this context, it is the happenstance of the Multidistrict Litigation assignment that determines whether tolling will occur. If this MDL

had been assigned to a judge in the Eighth Circuit, all of these plaintiffs would have been able to go forward with their suits.

There are strong arguments for applying federal law, and the *American Pipe* rule, rather than state law. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537 (1958), held that even when application of state law is likely to be outcome determinative, federal law should be applied when there is an important, overriding federal interest. As emphasized by the Supreme Court in *American Pipe*, there is a "strong federal interest" in protecting the functionality of Rule 23 and promoting "efficiency and judicial economy." Under the reasoning of *American Pipe*, if the statute of limitations is not tolled, potential class members would flood the court system with individual claims.

The issue of class action tolling and the appropriate application of *American Pipe* is an issue of great national importance and thus frequently has required clarification by this Court. *See*, *e.g.*, *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018) (holding that *American Pipe* tolling does not permit follow-on class action cases once the statute of limitations expires); *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017) (holding, in part, that *American Pipe* does not apply to the Securities Act of 1933 because the Act's three-year time bar is a statute of repose with the purpose of overriding equitable tolling rules).

There are still six circuits that have not decided this issue: the First, Third, Tenth, Eleventh, District of Columbia, and Federal Circuits. A member of a class action filed in one of these circuits under diversity jurisdiction has "every incentive to file a separate action prior to the expiration of his own period of limitations" resulting in a "needless multiplicity of actions." This is exactly what Federal Rule of Civil Procedure 23 and the tolling rule from *American Pipe* and *Crown* tried to avoid. *See Crown*, 462 U.S. at 350-51.

This case presents the ideal vehicle to resolve this important question of federal law. There is no question that with tolling under *American Pipe* the suits could go forward. But absent tolling of the statute of limitations, the class action is untimely as the Fifth Circuit held.

II. The Supreme Court Should Grant Review to Resolve a Conflict Among the Circuits and an Issue of National Importance as to Whether Tolling Applies When a Plaintiff Brings an Individual Action Before the District Court Has Ruled on the Class Certification Question.

If this Court finds that the federal law of *American Pipe* applies here, then this case will present another question that this Court has not yet addressed: whether tolling applies when a plaintiff brings an individual action before the district court has ruled on class certification in the underlying putative class action. *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540

F.3d 1223, 1230 (10th Cir. 2008) (noting that "[t]he Supreme Court has not addressed this question squarely, leaving it to percolate in the lower courts"); James J. Mayer, *Note*, *Rejecting the Class Action Tolling Forfeiture Rule*, 94 N.Y.U. L. Rev. 899, 901-902 (2019).

There is a clear Circuit split over how to treat cases when an individual member of a putative class pursues an independent, individual claim before the district court has decided the class certification issue, but after a non-tolled statute of limitations would have run. *See Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 789 (6th Cir. 2016) (recognizing the Sixth Circuit now "represents the minority rule").

The First and Sixth Circuits apply the forfeiture rule to bar these claims. *See Stein*, *id*. at 789 (declining to overrule existing Sixth Circuit precedent holding that "a plaintiff who chooses to file an independent action without waiting for a determination on the class certification issue may not rely on the *American Pipe* tolling doctrine.") (citing *Wyser–Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005)). *See also Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983) (approving of the forfeiture rule in dicta and noting that "*American Pipe* says nothing about [the plaintiff's] ability to maintain a separate action while class certification is still pending" and that "[t]he policies behind Rule 23 and *American Pipe* would not be served, and in fact would be disserved, by guaranteeing a separate suit at the same time that a class action is ongoing"); *see also* William Rubenstein, 3 Newberg on Class

Actions § 9:63 n.3 (5th ed. 2018) (noting district courts in the Third and Fourth Circuits have applied the forfeiture rule).

However, the Second, Ninth, and Tenth Circuits have rejected the rule and toll the statute of limitations for the period before the district court decides the class certification issue. *See In re WorldCom Securities Litigation*, 496 F.3d 245, 256 (2d Cir. 2007) ("because Appellants were members of a class asserted in a class action complaint, their limitations period was tolled under the doctrine of *American Pipe* until such time as they ceased to be members of the asserted class, notwithstanding that they also filed individual actions prior to the class certification decision."); *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986, 1009 (9th Cir. 2008) (adopting the Second Circuit's reasoning and applying *American Pipe* tolling); *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1232 (10th Cir. 2008) (finding "the rationale of the *In re WorldCom* and *In re Hanford* decisions consonant with *American Pipe*'s language and its conceptual and pragmatic underpinnings" and joining the Second and Ninth Circuits); *see also* Rubenstein, 3 Newberg on Class Actions § 9:63 n.6 (noting district courts in the Eighth Circuit have declined to apply the rule); Mayer, *Note*, supra, at 903 n.18 (collecting district court cases).

If this MDL had been assigned to a district court in the Second, Ninth, or Tenth Circuits, these cases could have gone forward because these courts have held that tolling applies when a plaintiff brings an individual action before the district court has ruled on

the class certification question. Without this approach, plaintiffs have the strong incentive to file their own lawsuits before the district court decides class certification so as to be sure that the statute of limitations is met. The multiplicity of lawsuits is hardly an efficient approach. This is an issue that arises frequently and needs to be resolved by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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