No. 19-1157

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 A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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June 5, 2020

QUESTIONS PRESENTED

The first question presented is whether, contrary to the Fifth Circuit below and nearly every other circuit that has considered the question, this Court should hold that *American Pipe* tolling displaces state-law tolling rules for state-law causes of action, so that a Florida cause of action that Florida law finds untimely can proceed anyway in federal court.

The second question presented, although entirely contingent on the first, and although the Fifth Circuit has never ruled on it in this case or any other, is whether, even if *American Pipe* tolling did govern in diversity actions, that tolling doctrine would apply to help a plaintiff who filed his own separate suit before the district court ever ruled on class certification.

CORPORATE DISCLOSURE STATEMENT

Pershing, L.L.C.'s sole member is Pershing Group LLC, whose sole member is Bank of New York Mellon Corporation. Bank of New York Mellon Corporation is a publicly traded corporation.

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STATEMENT OF THE CASE

This consolidated appeal involves six lawsuits arising from the Allen Stanford Ponzi scheme. App. 5. Petitioners brought two claims against Pershing, L.L.C.: fraud and aiding and abetting Stanford's breaches of fiduciary duty. App. 5–6. Both claims arise under Florida law and are subject to Florida's four-year statute of limitations. App. 6.

Stanford's Ponzi scheme involved selling fake certificates of deposit from Stanford International Bank, Ltd. ("SIBL"). App. 29. In that scheme, the Stanford Group Company ("SGC") referred investors to SIBL to buy the certificates of deposit, and collected referral fees. App. 3.

Pershing did not participate in the Ponzi scheme. Pershing provided back-office ministerial clearing services for SGC. Pershing did not sell or clear the SIBL certificates of deposit. In some cases, Pershing would process a wire transfer or other clearing services for SGC's investors. App. 3.

The Ponzi scheme became public in February 2009, when the Securities and Exchange Commission shut down SGC and filed its civil complaint. App. 5. Within two days, national newspapers covered the story. App. 5. Those papers included the *Wall Street Journal*, *Washington Post*, and *Miami Herald*. ROA.1957; ROA.1978–79; ROA.1983.

That same year, class counsel for SIBL CD purchasers filed *Turk v. Pershing, LLC*, No. 09-02199 (N.D. Tex. filed Nov. 18, 2009). App. 5, 34. At first this putative class action included Petitioners.

On June 25, 2010, the class counsel in *Turk* narrowed the class definition to include only those investors who purchased their CD through a wire transfer processed by Pershing through an SGC brokerage account. App. 5. That removed the current Petitioners from the putative *Turk* class because Petitioners did not purchase their CD through a wire transfer that involved Pershing. App. 5. As the district court later noted, Petitioners "concede[d] that they were no longer members of the proposed class in the Turk Suit as of June 25, 2010." App. 39.

Years later, Petitioners filed their own individual lawsuits, between November 20, 2013, and February 2015. Petitioners filed in the Southern District of Florida based on diversity jurisdiction and brought claims under Florida law. App. 5, 29–30. As part of the Stanford multidistrict litigation, the court transferred the actions to the Northern District of Texas for disposition. App. 30.

There, the district court ruled that Petitioners' claims were time-barred. All parties agreed that the claims were subject to a four-year Florida statute of limitations. Thus, all parties agreed that without tolling, the claims were untimely. Pershing contended that the claims accrued February 17, 2009, and so the first of them was untimely by more than nine months (filed November 20, 2013). App. 33. Petitioners argued that the claims accrued November 18, 2009, so that without tolling, the first was untimely by two days. App. 33. Thus, regardless of the accrual date, the case boiled down to tolling theories.

Petitioners argued three different tolling theories. App. 33. The district court rejected all three.

App. 41–42. Petitioners have now abandoned all but *American Pipe* tolling. App. 33.

The Fifth Circuit affirmed in a unanimous opinion by Judge Willett. App. 27. The Fifth Circuit noted that with no "tolling, all [Petitioners'] cases were indisputably filed late." App. 7.

At the Fifth Circuit, Petitioners first contended the Florida law permitted class-action tolling. 5th Cir. Opening Br. 13.

The court ruled that Florida law rejects class-action tolling. App. 10–11. The court analyzed the clear statutory language in Florida Statute § 95.051, which provides a specific list of situations when the law permits tolling. App. 10–11. *American Pipe* tolling is not on that list. And the Florida Legislature made that list exclusive. Fla. Stat. § 95.051(2) (stating that "[a] disability or other reason does not toll the running of any statute of limitations except those specified in this section"); *see also Major League Baseball v. Morsani*, 790 So.2d 1071, 1075 (Fla. 2001) (referring to the statute as the "exclusive list of conditions that can 'toll' the running of the statute of limitations").

The Fifth Circuit, like the district court, made a well-grounded *Erie* prediction that the Florida Supreme Court would not violate unambiguous statutory language. App. 11, 37. Petitioners have now abandoned any argument that the Fifth Circuit got Florida law wrong.

Next, Petitioners argued that *American Pipe* tolling law trumps contrary Florida law. The Fifth

Circuit described Petitioners' attempt to impose federal law as an "uphill battle." App. 19. The Fifth Circuit had addressed the same issue two decades earlier in *Vaught v. Showa Denko K.K.*, 107 F.3d 1137, 1143 (5th Cir. 1997), *cert. denied*, 522 U.S. 817 (1997).

The Fifth Circuit first noted that "the Supreme Court has stated that generally, for diversity actions, a federal court should apply not only state statutes of limitation but also any accompanying tolling rules." App. 20 (quoting *Vaught*, 107 F.3d at 1145). The court then looked to whether any overpowering federal interest required applying the federal equitable rule of *American Pipe* over contrary Florida law. There was none. After all, "the *American Pipe* tolling rule was not mandated by the text of a federal statute or rule." App. 21 n.53. And "without federal law or a federal rule of civil procedure, the federal government's interest in tolling would not overpower a strong state interest." App. 22. The court then ruled that Florida had clearly expressed a strong interest in the application of its limitation periods by enacting § 95.051, a statute reflecting a "deliberate policy choice by [the state] legislature." App. 23.

The Fifth Circuit aptly concluded that Petitioners' claims were time-barred. App. 4.

REASONS FOR DENYING THE WRIT

First, most circuits, including the Fifth Circuit here, are right, and the question is not close. Seventy-five years of this Court's precedents hold that state-law actions in federal court on diversity jurisdiction must use state statutes of limitation, including

integral state service and tolling rules. Well after *American Pipe*, this Court stated that "the practice of borrowing state statutes of limitations logically includes rules of tolling." *Chardon v. Soto*, 462 U.S. 650, 657 (1983). That means in a diversity case, the state anti-tolling *statute* prevails over a federal, equitable judge-made tolling rule. At least seven circuits faithfully apply this Court's precedents to reach that result.

Second, there is no split of authority warranting certiorari. At most, the "split" is the Eighth Circuit against *every other* circuit that has considered the question. And although many courts have considered this question after the Eighth Circuit's 1993 decision, none have agreed with it. All have instead joined the majority position of the opinion below, which has been the law of the Fifth Circuit for over twenty years.

Further, Petitioners overstate the practical significance of any split in authority. Below, Petitioners argued that *every state* that has confronted the question—including most in the Eighth Circuit—has embraced class-action tolling as a matter of state law. Although there may be rare exceptions like Florida, in most states, class-action tolling applies whether federal or state law governs.

Petitioners threaten a multiplicity of actions unless their view prevails. This Court rejected the same argument in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017) and again in *China Agritech v. Resh*, 138 S. Ct. 1800 (2018). Nor do Petitioners cite any

evidence of a real problem, although the majority of circuits for years now have been against them.

Third, there is a vehicle problem anyway. Even imagining Petitioners should get *American Pipe* tolling, their actions would *still* be time-barred by about two months. In order to gain any relief on the timeliness question *alone*, Petitioners would need *American Pipe* tolling as well as an incorrect view of the accrual or end-of-tolling dates.

Finally, the second question presented does not warrant review in the first instance. The Fifth Circuit never ruled on the second issue (in this or any other case), so there is nothing for this court to affirm or reverse. And it was hardly briefed, even below: Petitioners' lone comment on it, delivered in a footnote in a reply brief, was to deny its justiciability. Moreover, the second question has an even more severe vehicle problem than the first. The Court only reaches the second question if it rules for the Petitioners on the first. But even if the Court rules for Petitioners on *both* questions presented, the action would still be time-barred.

This Court should deny the Petition.

I. This Court's precedent already compels the decision reached by the Fifth Circuit and most other circuits.

Certiorari is unwarranted because this Court's decisions already require the application of coordinate state tolling rules when a state statute of limitations applies. So it is no accident that every circuit that has considered this issue, apart from the Eighth, has

concluded that state-law tolling principles—and not *American Pipe*—govern state-law claims. Petitioners scarcely even argue that these courts are wrong. Pet. 9. In fact, the great majority of circuits are correct, and the question is not close.

First, a bedrock principle is that federal courts exercising diversity jurisdiction over state-law claims must apply state-law statutes of limitation. *Guar. Trust Co. v. York*, 326 U.S. 99, 107, 110 (1945) (taking up the "narrow question whether, when no recovery could be had in a State court because of the action is barred by a statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship" and answering no: "if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery"). As *York* noted, "it would be a mischievous practice to disregard state statutes of limitation whenever federal courts think that the result of adopting them may be inequitable." *Id.* at 111.

Second, this Court has repeatedly held that using a state statute of limitations includes using the state's service and tolling rules as well. For instance, in *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980), the Court held that a federal court sitting in diversity had to obey state service rules as "part and parcel of the [state] statute of limitations." *Id.* (dismissing a state-law claim for untimeliness under a state service rule). This Court has long recognized that tolling rules are a key part of state limitations periods. *See, e.g.*, *Johnson v. Railway Express Agency*, 421 U.S. 454, 463–64 (1975) ("[T]he chronological length of the limitation period is interrelated with provisions regarding tolling . . . . [A]

federal court is relying on the State's wisdom in setting a limit, and exceptions thereto").

Even when federal courts borrow state statutes of limitation for *federal* causes of action, they borrow state tolling rules as well. *See Bd. of Regents v. Tomanio*, 446 U.S. 478, 484 (1980) (holding that a federal civil rights claim was untimely under a state statute of limitations and state tolling rules and rejecting application of a "federal tolling rule" not enumerated in the state tolling statute); *Chardon*, 462 U.S. at 657 (applying a Puerto Rican tolling rule to a federal cause of action because "the practice of borrowing state statutes of limitations logically includes rules of tolling").

This Court's precedents "stand for the proposition that, in any case in which a state statute of limitations applies—whether because it is 'borrowed' in a federal question action or because it applies under *Erie* in a diversity action—the state's accompanying rule regarding equitable tolling should also apply." *Wade v. Danek Med., Inc.*, 182 F.3d 281, 289 (4th Cir. 1999). That is because "'[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application.'" *Hardin v. Straub*, 490 U.S. 536, 539 (1989) (quoting *Johnson*, 421 U.S. at 464).

Nothing in *American Pipe & Construction Co. v. Utah*, which pre-dated nearly all of these precedents, changes this analysis. 414 U.S. 538 (1974). *American Pipe* dealt with federal, not state, causes of action and limitations periods. *Id.* at 540–41 (relating to federal antitrust law); Pet. 7. "In

American Pipe, federal law defined the basic limitations period, federal procedural policies supported the tolling of the statute during the pendency of the class action, and a particular federal statute provided the basis for deciding that the tolling had the effect of suspending the limitations period." *Chardon*, 462 U.S. at 660–61. Unlike here, "no question of [interaction with] state law was presented." *Id.* at 661.

Equally important, *American Pipe* itself clarified that it meant to create equitable tolling only "under certain circumstances *not inconsistent with the legislative purpose*." 414 U.S. at 559 (emphasis added); *id.* at 557–58 ("The proper test is . . . whether tolling the limitation in a given context is consonant with the legislative scheme."); *see also* App. 23–24. In other words, *American Pipe* tolling was never meant to and does not trump contrary statutory law. This Court has recently held exactly that. *California Pub. Employees' Ret. Sys.*, 137 S. Ct. at 2051–55 (declining to apply *American Pipe* tolling when it would be contrary to a statute of repose). *American Pipe* was "grounded in the traditional equitable powers of the judiciary." *Id.* at 2052. Thus, when a legislative body has made an express policy choice about the statute of limitations and its tolling exceptions, as Florida has here, no room exists for traditional equitable judgments in which courts make their own rules.

Petitioners suggest there is an "overriding federal interest" in "protecting the functionality of Rule 23." Pet. 9. But "Rule 23 does not so much as mention the extension or suspension of statutory time bars." *California Pub. Employees' Ret. Sys.,* 137 S. Ct. at 2051–52 ("Nothing in the *American Pipe* opinion

suggests that the tolling rule it created was mandated by the text of a statute or federal rule.").

In sum, all agree the four-year Florida statute of limitations governs here, and all now concede that Florida disallows class-action tolling. So in Florida state court, Petitioners' Florida state-law claims would be time-barred. They ask this Court to resuscitate those claims because they are in federal court. That has been improper under this Court's precedents for 75 years. *York*, 326 U.S. at 109. And Petitioners seek to obliterate a state anti-tolling *statute* beneath a federal judge-created equitable rule. *Contra Tomanio*, 446 U.S. at 492 ("But the [federal] rule allowing tolling can scarcely be deemed a triumph of federalism when it necessitates a rejection of the rule actually chosen by the New York Legislature.").

Petitioners' argument would also create a bizarre situation in which federal courts borrow state tolling rules for *federal* causes of action, but then refuse to follow the same state tolling rules when adjudicating purely *state*-law causes of action. That makes no sense. For decades now, the Fifth Circuit—as well as nearly every other circuit—has rejected such an expansion of *American Pipe*.

The Petition's near-total failure to defend the merits of its argument reflects that it is indefensible under this Court's precedent.

II. There is no split of authority worthy of this Court's attention.

The courts of appeals overwhelmingly—and correctly—have held that state tolling rules apply. Certiorari is not needed for this lopsided split, particularly where the one outlier circuit's apparent application of federal tolling rules has little practical effect anyway.

A. Modern circuit decisions have uniformly favored the correct approach.

Since the 1990s, most circuits have lined up in general agreement that state-law tolling rules, not *American Pipe* tolling, govern in diversity actions. Petitioners identify a single outlier in the Eighth Circuit. Given the lineup and extensive analyses of the issue on the majority side, no more circuits are likely to follow the Eighth.

The Fifth Circuit has long held that state tolling rules govern. *See Vaught*, 107 F.3d 1137. In *Vaught*, the court observed that a "Texas [anti-tolling] rule clearly conflicts with the well-established federal practice on class action tolling." *Id.* at 1147. The court found that Texas's tolling rule was "an integral part of a statute of limitations," a matter "reflecting a deliberate policy choice by its legislature." *Id.* On the other hand, "neither Rule 23 nor any other [federal] rule expressly mandates tolling limitations periods." *Id.* at 1146. Thus, after examining *American Pipe*, *Byrd v. Blue Ridge*, and *Hanna v. Plumer*, the court held that "the federal interest in [tolling] does not trump the Texas tolling rule." *Id.* at 1147.

Other circuits rapidly reached the same conclusion. *E.g.*, *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 265 (7th Cir. 1998) (Easterbrook, J.) ("When state law supplies the period of limitations, it also supplies the tolling rules."); *Wade*, 182 F.3d at 289 (analyzing *Walker*, *Chardon*, and *Tomanio* at length and concluding that "in any case in which a state statute of limitations applies . . . the state's accompanying rule regarding equitable tolling should also apply"). The *Wade* court observed that it was joining "[m]ost of the other federal courts to have considered the issue in the diversity context." *Id.*

More recent decisions have followed *Vaught* and *Wade*, either explicitly or by using the same reasoning. *E.g.*, *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 567 (6th Cir. 2005) (applying Ohio class-action tolling principles to Ohio state claims in federal court on diversity); *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1228 (10th Cir. 2008) (holding that the court "must follow Colorado's tolling rules, as they are an integral part of the several policies served by the statute of limitations").

In *Casey v. Merck & Co.*, 653 F.3d 95, 100 (2d Cir. 2011), the Second Circuit cited *Wade* and *Vaught*, found "the reasoning of these cases compelling" and "agree[d] that tolling here is properly understood to be a question of state law." The *Casey* court added that it was "now join[ing] the majority of [its] sister courts" in concluding that state tolling rules govern. *Id.* Finally, in *Albano v. Shea Homes Ltd. Partnership*, 634 F.3d 524, 530 (9th Cir. 2011), the Ninth Circuit held that "[f]ederal courts must abide by a state's

tolling rules, which are integrally related to statutes of limitations."

These considered views of the Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits are thoroughly reasoned and all more recent than the Eighth Circuit's first key precedent on this point. There is little reason to expect any other circuit to join the Eighth.

B. The Eighth Circuit view has no other followers.

The Eighth Circuit went astray in an unusual case, *Adams Public School District v. Asbestos Corp.*, 7 F.3d 717 (8th Cir. 1993). *Adams* was built on a error of law: The Eighth Circuit believed North Dakota would not apply class-action tolling, *id.* at 718, even though North Dakota had codified *American Pipe* in its Rule of Civil Procedure 23(r) in 1979. So that case addressed a nonexistent conflict between state and federal law.

Adams involved a school district suing an asbestos company under North Dakota law. During the appeal, North Dakota passed a new statute specifically extending its limitations period for suits over asbestos in public buildings. The new statute could have disposed of the case by itself (as could application of North Dakota's Rule 23(r)).

But a panel majority announced that it could "serve both the federal and state interests by applying the *American Pipe* rule." *Adams*, 7 F.3d at 719. The panel majority then noted that it would have applied *American Pipe* regardless of the new statute. *Id.*

("[W]e view the federal interest here as sufficiently strong to justify tolling in a diversity case when the state law provides no relief"). Judge Morris Arnold disagreed. He concurred separately to note that he believed the new statute solved the problem and he would not have reached the issue of equitable tolling at all. *Id.* at 720 (concurring).

Adams lacks an explanation or rationale supporting its assertion that *American Pipe* tolling should govern regardless of state law. Indeed, the *Adams* court described that potential analysis as "complex" and "involv[ing] issues not argued in this appeal," and stated that it was "not undertak[ing] such a delicate task." *Id.* at 719. Ultimately, in its 2-page opinion, the panel majority offered one conclusory sentence—that the "federal interest here [was] sufficiently strong." *Id.*

The Eighth Circuit has relied on *Adams* for this proposition once, sixteen years ago: in *In re General American Life Insurance Co. Sales Practices Litigation*, 391 F.3d 907 (8th Cir. 2004). That case simply cited and quoted *Adams*. It offered no further explanation or recognition of the views of this Court or the many other circuits on this topic. *Id.* at 915. No party in *General American Life* asked the Eighth Circuit to revisit *Adams*, or even cited *Adams* at all, or any of the other circuits' contrary views.

The Eighth Circuit's position on this issue amounts to an unnecessary, offhand comment in one case, followed by a single-line quote of that comment in a second case, now sixteen years ago. This is not a considered split of authority.

C. The widespread adoption of class-action tolling limits the practical effect of the Eighth Circuit's view.

The Eighth Circuit's application of *American Pipe* makes no difference when *American Pipe*-type tolling would apply under *state* law. In fact, Petitioners argued below that "every state that has confronted the question has embraced class action tolling." 5th Cir. Opening Br. 20. So except in outliers like Florida, whether state or federal law requires class-action tolling is mostly academic. *See, e.g.*, *Great Plains Tr. Co. v. Union Pac. R. Co.,* 492 F.3d 986, 997 (8th Cir. 2007) (Because Kansas has "adopted the *American Pipe* rule," the court could use "both Kansas and federal law" without picking one over the other.).

Most states within the Eighth Circuit have embraced class-action tolling as a matter of state law anyway. Indeed, North Dakota's Rule 23(r) "codifies the *American Pipe* case," and thus would have mooted the dispute in *Adams* had the Eighth Circuit applied it. N.D. R. Civ. P. 23, comt. to subd. (r)*; see also, e.g.*, *Bartlett v. Miller & Schroeder Municipals, Inc.*, 355 N.W.2d 435, 439 (Minn. Ct. App. 1984) (applying *American Pipe* tolling); *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167, 180 (Iowa 1977) (same); *Blaylock v. Shearson Lehman Bros., Inc.*, 954 S.W.2d 939, 941 (Ark. 1997) (same); *One Star v. Sisters of St. Francis, Denver, Colo.*, 752 N.W.2d 668, 680–81 (S.D. 2008) (implying the availability of *American Pipe* tolling).

In fact, Petitioners argued below that at least *34* states nationwide have already adopted class-action tolling. 5th Cir. Opening Br. 20. So Petitioners'

cert-stage argument overstates the practical importance of this issue.

D. There is no evidence of a multiplicity of actions.

Petitioners argue that, as the law now stands, in many states a plaintiff has "'incentive to file a separate action prior to the expiration of his own period of limitations' resulting in a 'needless multiplicity of actions.'" Pet. 9–10. But Petitioners make no argument and present no evidence that this multiplicity of actions actually exists. Their argument below that at least 34 states already have "embraced class action tolling" explains why no multiplicity problem should be expected. 5th Cir. Opening Br. 20.

Petitioners recycle this argument from past Supreme Court cases in which it failed. In *China Agritech*, the respondent contended that "declining to toll the limitation period for successive class suits will lead to a 'needless multiplicity' of protective class-action filings." 138 S. Ct. at 1810. The Court found "little reason to think that protective class filings will substantially increase." *Id.* In doing so, the Court specifically noted that some circuits had declined to toll years earlier, yet there was "no showing that these Circuits have experienced a disproportionate number of duplicative, protective class-action filings." *Id.*

In *California Public Employees' Retirement System*, the Court considered petitioner's argument that by "declining to apply *American Pipe* tolling to statutes of repose . . . . nonnamed class members will inundate district courts with protective filings." 137 S. Ct. at 2053. The Court determined the "concerns

likely are overstated." *Id.* at 2054. There was no "evidence of any recent influx of protective filings" where the no-tolling rule had been in place for years already, a fact the Court called "not surprising." *See id.* The absence of protective filings is unsurprising here, too, because according to Petitioners, at least 34 states already apply the tolling rule that Petitioners say fixes any multiplicity problem. 5th Cir. Opening Br. 20; Pet. 12-13.

III. This case is a poor vehicle because Petitioners' claims are untimely regardless of the questions presented.

This case is a poor vehicle for this Court because even if *American Pipe* tolling applied, Petitioners' claims were untimely. That is, to make their claims timely Petitioners need both *American Pipe* tolling *and* an incorrect determination of the accrual or end-of-tolling dates.

Neither the district court nor the Fifth Circuit addressed this issue below because the lack of *American Pipe* tolling alone was dispositive. *See* App. 33 (noting that regardless of the parties' dispute over accrual, without tolling the claims were untimely, and so "assuming" Petitioners' suggested accrual date); App. 6 (recognizing that the district court had "assumed" Petitioners' suggested accrual date). Even so, Pershing fully briefed this basis for affirming. 5th Cir. Response Br. 38–45 ("III. The Claims in this Appeal are Untimely even with Class Action Tolling."); ROA.1518–19 (Pershing arguing at summary judgment that the claims were untimely regardless of *American Pipe* tolling)

Petitioners' claims accrued no later than February 17, 2009. App. 29. On that date, the SEC announced its charges based on the Stanford Ponzi scheme. App. 29. The *Wall Street Journal*, *Washington Post*, and *Miami Herald* rapidly provided detailed coverage on national news. *E.g.*, Kara Scannell et al., SEC Accuses Texas Financier of Massive $8 Billion Fraud, *WSJ*, Feb. 18, 2009 (citing Pershing as the clearing firm and quoting a Pershing employee), ROA.1957–60; App. 5; ROA.1978–79; ROA.1983. The coverage addressed both the charges against Stanford and Pershing's role as a clearing firm. ROA.1959–60, ROA.1967.

Under Florida law, even applying a discovery rule, any reasonably diligent person should have known of the Ponzi scheme in February 2009. *Eghnayem v. Boston Scientific Corp.*, 873 F.3d 1304, 1323 (11th Cir. 2017) (Florida law requires only that a reasonably diligent person would know of the "possible invasion of their legal rights"). By late February 2009, Stanford's scheme was shut down and widely publicized. Petitioners' claims for fraud and aiding and abetting a breach of fiduciary duty accrued no later than this. App. 33 (noting Pershing's arguments on the February accrual date); App. 40–41 (same); 5th Cir. Response Br. 38–40; ROA.1512–16 (Pershing's District Court Memorandum in Support of Summary Judgment).

Even if *American Pipe* tolling applied, it would operate only from November 18, 2009, to June 25, 2010. Class counsel filed *Turk v. Pershing L.L.C.* on November 18. App. 34. On June 25, class counsel stipulated to a new class definition that excluded Petitioners. App. 39 ("[Petitioners] themselves

concede that they were no longer members of the proposed class in the Turk Suit as of June 25, 2010.").

So the claims accrued February 17, 2009, and even imagining that class-action tolling applied, it lasted for seven months and seven days. That would make Petitioners' tolled deadline to file September 24, 2013. The first filing came two months later, in November 2013. Pet. 3 (admitting that no case was filed before November 20, 2013, and some were filed as late as February 2015). Petitioners could not succeed in having these cases heard even if they were right about *American Pipe* tolling.

IV. The secondary question presented does not warrant review.

The second question presented is whether *American Pipe* tolling can apply when a plaintiff brings an individual action *before* the district court has ruled on class certification. Pet. 10–13. This question would arise only if this Court grants the first question presented and then rejects the view of the Fifth and nearly all other circuits on it. The issue does not warrant certiorari for several reasons.

First, the opinion below did not address or acknowledge this issue, so there is no judgment on it to affirm or reverse. In fact, the Fifth Circuit as a whole does not appear to have ever addressed it. Pet. 11–12 (arguing that the split is between the First/Sixth and Second/Ninth/Tenth Circuits). "The Court does not ordinarily decide questions that were not passed on below." *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1773 (2015). This Court "is 'a court of final review and not first view.'"

Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012).

Second, Petitioners not only failed to raise or brief this issue below, they disclaimed it. Their sole reference to this issue in the Fifth Circuit was a footnote in their reply brief. 5th Cir. Reply Br. 7 n.4. In that footnote, Petitioners argued that the issue "is now moot because class certification has now been denied in *Turk*." *Id.* In short, the sole comment on this issue Petitioners made below was to deny that the issue was justiciable at all.

Third, this issue is better seen as a vehicle problem with the first question presented than as a second reason to grant certiorari. To obtain any relief at all, Petitioners would have to prevail on the first question by persuading this Court that most circuits are wrong and that federal law trumps state law so that *American Pipe might* apply. Pet. 10 (acknowledging that "this case will present [this] question" only if "this Court finds that the federal law of *American Pipe* applies here"). Petitioners *then* must persuade this Court to rule their way on this issue—whether the scope of *American Pipe* tolling is broad enough to apply even before any certification decision from the trial court—even though no court below in this case has ever addressed or even acknowledged this issue. And even if Petitioners succeeded at all of this, a proper view of the accrual date and end-of-tolling means the claims would all *still* be untimely. *See supra*, at 17–19.

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

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JUNE 2020