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

REPLY BRIEF FOR PETITIONERS

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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.

A. No Prior Decision of this Court Has Decided this Issue.

In *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court held that filing a class action tolls the running of statutes of limitations for class members who choose to file individual actions. The plaintiffs in both *American Pipe* and *Crown* filed suits under federal law based on federal question jurisdiction. 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.

Respondent contends that "[t]his Court's precedent already compels the decision reached by the Fifth Circuit and other Circuits." Brief in Opposition [Br.Opp.] at 6. This is simply wrong: no decision of this Court has considered the application of *American Pipe* and *Crown* to diversity actions. Respondent relies on precedents such as *Guar. Trust Co. v. York*, 326 U.S. 99 (1945) and *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), which hold that generally state statutes of

limitations and tolling apply in diversity cases. Br.Opp. at 7.

But none of these cases involve class action suits, unlike *American Pipe*, *Crown*, and this case. This distinction is crucial. The central issue presented for this Court is whether the federal courts' interests with regard to class action suits under Federal Rule of Civil Procedure 23 justify applying federal rather than state tolling law. This Court has been clear that overriding federal interests warrant applying federal law in diversity cases, even when that choice is "outcome determinative" in the case. *Byrd v. Blue Ridge Rural Elec. Coop. Inc.*, 356 U.S. 525, 537 (1958) ("[W]ere 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow state practice. . . . But there are countervailing considerations at work here. The federal court is an independent system for administering justice to litigants who properly involve its jurisdiction.").

Nor, as Respondent claims, would it be a "bizarre situation" to apply federal law of tolling to class action suits filed under Federal Rule of Civil Procedure 23 even though state law is followed in other instances. Br.Opp. at 10. Under *Hanna v. Plummer*, 380 U.S. 460 (1965), it long has been established that federal procedural law and the Federal Rules of Civil Procedure apply, while state substantive law generally controls. The crucial question presented under *Byrd* and *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), is whether there is an overriding federal interest in

applying federal law tolling principles in a class action in federal court.

B. There is a Split Among the Circuits as to the Law to Be Applied for Tolling When a Class Action is Filed in Federal Court Based on Diversity Jurisdiction and it is Important that this Court Resolve this Issue.

Respondent does not deny, and cannot deny, that 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. Nor can Respondent deny that had this MDL case been assigned in the Eighth Circuit rather than the Fifth Circuit, *American Pipe* would have been applied and the case would have gone forward.

The law in the Eighth Circuit in this regard is clearly established. In *Adams Public School 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." Similarly, the Eighth Circuit, in *In re General American Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 915 (8th Cir. 2004), held 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.

Respondent tries to minimize the Eighth Circuit's decision by claiming that "modern circuit decisions have uniformly favored the correct approach." Br.Opp. at 11. The definition of modern is unclear, but the Eighth Circuit's 1993 and 2004 decisions likely meet any test for "modern." Respondent says that this was an "unnecessary, offhand comment in one case, followed by a single-line quote of that comment in a second case, sixteen years ago. That is not a considered split of authority." Br.Opp. at 14. But by any reading of *Adams*, its holding is that *American Pipe* is to be followed and federal tolling law is to be applied in a class action in federal court based on diversity. *General American Life* explicitly reaffirms this and treats the law as settled in that Circuit. Any federal district court in the Eighth Circuit must follow this rule. That is, by definition, a split between the Eighth Circuit and the other Circuits that have ruled which have come to the opposite conclusion.

Respondent says that this is a "lopsided split . . . where the one outlier circuit's apparent application of federal tolling rules has little practical effect anyway." Br.Opp. at 11. Respondent is correct that at this point it is a lopsided split, though many Circuits have yet to rule on the issue, but Respondent is wrong that there is little practical effect to this split.

Quite importantly, if an MDL is assigned to a court within the Eighth Circuit, then the *American Pipe* tolling rule is applied. But if an MDL is assigned to the other Circuits that have ruled on this issue, state tolling law will be applied. *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). And there is no guidance as to what law should be applied in the Circuits that have not yet ruled: the First, Third, Tenth, Eleventh, District of Columbia, and Federal Circuits. The crucial question of tolling should not depend on where an MDL is assigned.

Respondent also argues that the issue is unimportant because 34 states already follow the *American Pipe* tolling rule and that Florida, the state whose law was applied here, is an outlier. Br.Opp. at 15. Of course, 16 states, the District of Columbia, and the territories are not an insignificant number of jurisdictions or enough to make Florida an "outlier." But Respondent's argument leads to exactly the opposite conclusion: this Court's ruling that *American Pipe* applies in diversity cases would create necessary uniformity in federal courts across the country with relatively little impact on most states. Whether a class action can go forward should not depend on the accident of the Circuit where an MDL is assigned or whether it arises in one of the 16 states, like Florida, that do not follow *American Pipe*.

Moreover, many of these 34 states have another doctrine which provides that tolling does not apply "cross jurisdictionally." That is, the law in these states provides that if a class action is filed out of state or in

federal court, tolling does not apply to subsequent suits by absent class members. *See*, *e.g.*, *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805 (Tenn. 2000). This means that there is going to be a recurring difference between tolling under *American Pipe* and state tolling rules in many different states across the country.

The split also has the practical effect of encouraging a multiplicity of suits. In *Crown*, this Court said that the tolling while a class action is pending is desirable because otherwise "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions – precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *See Crown*, 462 U.S. at 350-51.

There is no reason to believe that would be any different for class actions filed under diversity as opposed to federal question jurisdiction. The cases Respondent cites to the contrary are inapposite. Respondent argues that *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), rejected a concern about a multiplicity of suits. Br.Opp. at 16. In *China Agritech*, this Court said that protective *class actions* would not be numerous in the absence of the *American Pipe* rule; it did not address protective *individual* actions by absent class members, which is what this case is about. This Court unanimously held in both *American Pipe* and *Crown* that protective filings in the context of

individual actions are likely to be so numerous as to justify the tolling rule while the class action is pending.

Nor does *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S.Ct. 2042 (2017), support Respondent's position. Br. Opp. at 16. That case involved statutes of repose. It simply shows how the federal interests surrounding statutes of repose are different from statutes of limitations, not that this Court has in any way repudiated the federal policy recognized in *American Pipe* and *Crown*.

Ultimately, Respondent misses the important issue presented in this case that requires resolution by this Court: Is the federal interest in preventing a multiplicity of suits sufficient to warrant application of federal tolling rules from *American Pipe* and *Crown* to diversity cases? This Supreme Court's jurisprudence under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), requires courts to weigh three factors against one another to decide whether state law or federal common law like *American Pipe* governs in a diversity case: 1) how strong the state interest in the state law is; 2) how strong the federal interest in the federal law is; and 3) how "outcome determinative" applying one law versus another is. *See Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 535-39 (1958); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 436-39 (1996).

The federal interest, as expressed in *American Pipe* and *Crown*, is strong in tolling while a class action is pending. There is also a strong federal interest in uniformity among the federal courts so the outcome

does not depend on where a case is filed, or as here, where an MDL is assigned. By contrast, it is difficult to identify a strong state interest against class action tolling. This Court should grant review in this case precisely to decide whether there is a sufficient federal interest to warrant applying federal tolling law, and in the process to give further clarification as to when federal interests warrant applying federal law in diversity cases.

Respondent puts a great deal of weight on the claim that "[e]ven when federal courts borrow state statutes of limitations for *federal* causes of action, they borrow state tolling rules as well." Br.Opp. at 8. But this analogy actually leads to the opposite conclusion that Respondent draws. In *Chardon v. Soto*, 462 U.S. 650, 657 (1983), this Court said, "no federal policy – deterrence, compensation, uniformity, or federalism – was offended because of state tolling rules" because the state tolling rule gave *more* time than *American Pipe* did for an absent class member to file. The clear implication is that had the state tolling rule given less time to file, then the federal policy of judicial efficiency – discouraging protective filings by absent class members – might well have been offended and the state tolling rule might well not have been followed. A balancing of federal and state interests is needed to decide which law to apply in diversity cases. This case provides this Court the opportunity for doing this balancing and answering a question which has split the Circuits.

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. Respondent does not deny the existence of a significant split among the Circuits on this issue. The First and Sixth Circuits apply the forfeiture rule to bar these claims. *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005); *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983). 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); *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986, 1009 (9th Cir. 2008); *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1232 (10th Cir. 2008).

Respondent does not deny that 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.

Respondent says that "the opinion below did not address or acknowledge this issue," Br.Opp. at 19, and that this issue was not raised below. But this question is very much implicit in what was decided by the Fifth Circuit in its holding that the Florida tolling law barred the plaintiffs from going forward with their suit. The two issues are inextricably intertwined. If this Court rules, as Petitioners urge, that *American Pipe* applies in class actions filed in federal court based on diversity jurisdiction, it then must face the second question as to whether tolling applies when a plaintiff brings an individual action before the district court has ruled on the class certification question.

III. This Case Presents an Excellent Vehicle For Resolving the Issues Presented.

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.

Respondent, though, argues that this would be a poor vehicle "because Petitioners' claims are untimely regardless of the questions presented." Br.Opp. at 17. This is based entirely on Respondent's assertion of facts that, as Respondent admits, "neither the district court nor the Fifth Circuit addressed." Br.Opp. at 17. Respondent repeats its view of the chronology that it asserted in the lower courts. But both the district court and the Court of Appeals assumed that the cause of action accrued in November and would have been timely under the *American Pipe* rule.

Of course, as is so often the case, if the Court reverses the Fifth Circuit and holds that tolling under *American Pipe* applies, this case would need to be remanded for application of that rule. But this Court should not take Respondent's bald assertion of facts as true with no adjudication of the issue of timeliness under *American Pipe* in the lower courts.

Under *American Pipe*, the statute of limitations is "suspended" until class certification is resolved. This means that the statute is paused while the plaintiffs are members of a putative class action and begins running again if class certification is denied. *See Crown, Cork & Seal*, 462 U.S. at 354 ("Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied.").

This means that, here, the statute of limitations paused as soon as it began running. This is so because

the district court assumed the statute began running on November 18, 2009, when the complaint was filed in the *Turk* litigation, and, on that date, all 168 plaintiffs were putative members of the nationwide *Turk* class action.

It is true that, on June 25, 2010, counsel in *Turk* offered to modify the definition of a Florida *subclass* to exclude the plaintiffs here from that *subclass*. But the district court never accepted this offer and the offer terminated two years later when the district court denied the motion for certification as moot. More importantly, even if a mere offer to do so excluded some of the plaintiffs from that putative *subclass*, they were still part of the putative "main Plaintiff class" (i.e., nationwide class) the *Turk* lawsuit was pursuing.

Nor, contrary to what Respondent suggests, do Petitioners concede that the Fifth Circuit was correct as to Florida law. That is a question of state law and not one of federal law to be reviewed by this Court. What is before this Court, and what is crucial to the outcome of this case, is whether *American Pipe* and *Crown* apply when a class action suit is filed based on diversity jurisdiction in federal court.

CONCLUSION

For these reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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