No. 22A___

In the Supreme Court of the United States

JANE DOE 8, ET AL.,

Petitioners,

v.

CHIQUITA BRANDS INTERNATIONAL, INC.,

Respondent.

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI FROM FEBRUARY 13, 2023 TO MARCH 15, 2023

To the Honorable Clarence Thomas, as Circuit Justice for the Eleventh Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioners Jane Doe 8 et al. respectfully request that the time to file a petition for a writ of certiorari be extended 30 days from February 13, 2023, to and including March 15, 2023. Their petition will challenge the decision of the Eleventh Circuit in *Garcia v. Chiquita Brands International, Inc.*, 48 F.4th 1202 (11th Cir. 2022), a copy of which is attached. App. A. In support of this application, petitioners state:

The Eleventh Circuit issued its opinion on September 8, 2022, and it denied a timely petition for rehearing en banc on November 14, 2022. App. B. Absent an extension, the petition would be due on Sunday, February 12, 2023, which by operation of Supreme Court Rule 30.1 shifts to Monday, February 13, 2023. This

application is being filed at least 10 days before that date. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254 to review this case.

1. The petition will raise an important question regarding the tolling of statutes of limitations pending resolution of a motion for class certification in federal court.

a. The question arises from lawsuits based on respondent Chiquita Brands International, Inc.'s financial support for a federally designated terrorist organization, the Autodefensas Unidas de Colombia (AUC). In March 2007, respondent pled guilty to federal criminal charges of transacting with AUC. App. A at 4. After Chiquita's public criminal plea exposed its relationship with the AUC, several lawsuits were filed against the company on behalf of the AUC's victims in federal districts across the country; one was a putative class action filed in New Jersey (the "New Jersey Class"). *Id.* at 5-6. In 2008, the Judicial Panel on Multidistrict Litigation (JPML) consolidated the New Jersey Class and the other suits against Chiquita for pre-trial purposes in the Southern District of Florida. *Id.* Then, for nearly a decade, threshold motions to dismiss were litigated in the district court and the Eleventh Circuit (after an interlocutory appeal), the upshot being that the case was stalled, and discovery stayed, until 2017. *See id.* After discovery closed, the New Jersey Class representatives moved to certify a class in early 2019, and that motion was denied in May. *Id.*[*]

[*] The claims of many of the individual named plaintiffs are presently winding through a bellwether process in the Southern District of Florida towards trial after Chiquita's summary judgment motion was largely denied. *See, e.g.*, *Carrizosa v. Chiquita Brands Int'l, Inc.*, 47 F.4th 1278 (11th Cir. 2022); ECF Nos. 3238 & 3239,

b. After the denial, on March 25, 2020, several hundred previously putative class members filed individual actions in New Jersey district court, which were then also transferred to the Southern District of Florida by the JPML. App. A at 5. The district court dismissed the claims as untimely. *Id.* at 6.

c. The Eleventh Circuit affirmed. It recognized that in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court held that a federal class action tolls the statute of limitations for putative class members until class certification is decided, permitting putative class members to file individual claims after certification is decided when they would have otherwise been time-barred. App. A at 2-4; *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). To decide whether the rule applies to the limitations period for state or foreign law claims, the Eleventh Circuit held, a court must balance the federal interests animating the tolling rule against the interests of the jurisdiction whose statute of limitations would be tolled. App. A at 8-12. The court concluded that Columbia would not allow tolling in these circumstances and that because the tolling question was outcome determinative, Columbia's interest in denying tolling outweighed any federal interest, although the court engaged in no analysis of the strength of that interest. *Id*. at 21-29.

2. This case is a serious candidate for review. The Eleventh Circuit's decision widens a circuit split over whether *American Pipe*-style tolling applies in diversity

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In re Chiquita Brands Int'l, Inc., Alien Tort Statute & S'holders Derivative Litig., No. 08-md-1916 (S.D. Fla. Dec. 15, 2022).

cases advancing non-federal claims. The Eighth and Ninth Circuits hold that federal tolling applies regardless of the source of the plaintiffs' claims. *See, e.g.*, *In re Gen. Am. Life Ins. Co. Sales Pracs. Litig.*, 391 F.3d 907, 914-15 (8th Cir. 2004); *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1018-19 (9th Cir. 2000). In contrast, the Fourth, Second, and Seventh Circuits categorically apply state law tolling rules to state law claims. *See Wade v. Danek Med., Inc.* 182 F.3d 281, 289 (4th Cir. 1999); *Casey v. Merck & Co.*, 653 F.3d 95, 99-100 (2d Cir. 2011); *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 265 (7th Cir. 1998). Finally, in the Fifth and (now) Eleventh Circuits, whether tolling is governed by federal or state law depends on an unguided balancing of the state and federal interests. *See Vaught v. Showa Denko K.K.*, 107 F.3d 1137, 1146-47 (5th Cir. 1997); App. A at 8-12.

The question presented is an important and recurring issue, and the entrenched conflict is intolerable. As this Court explained in *American Pipe*, tolling limitations periods during the pendency of a federal class action is necessary to further federal interests of the highest order. Without class tolling, putative class members will file protective individual lawsuits, clogging the courts and undermining "the efficiency and economy of litigation which is a principal purpose of the [class action] procedure." *American Pipe*, 414 U.S. at 553. Moreover, many protections for putative class members found in Rule 23, namely the right to opt-out of class actions, are only "meaningful" if there is class tolling. *Crown*, 462 U.S. at 351-52 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974)).

The confusion created by this circuit split has enormous implications for the administration of class actions and impacts the decisions of countless putative class members. This case demonstrates the difficulties created by the circuit split, and the need for this Court's intervention. Before *Garcia*, the Eleventh Circuit had not decided whether federal or state class tolling rules governed, but district courts had ruled that federal law controlled. *See, e.g.*, *City of St. Petersburg v. Total Containment, Inc.*, 2008 U.S. Dist. LEXIS 106243, at *16-18 (S.D. Fla. Oct. 9, 2008). Here, the putative class members lost their claims because they did not correctly guess that the Eleventh Circuit would come out the other way. Moreover, the outcome could have easily been different if the JPML sent the MDL to the Eighth Circuit (where their claims would have been tolled) or kept it in the Third Circuit (which has not decided the question and where the claims and class were originally filed).

This case also demonstrates an added dimension of difficulty created by the Eleventh Circuit's balancing approach. Putative class members should also not have to guess how a court is going to balance the federal and state interests in class tolling to preserve their claims. Because it is impossible to know *ex ante* whether a court will find the federal or state interests more compelling, a putative class member is never going to rely on the federal class action and will always individually file their non-federal claims before certification is decided. The federal interests will therefore always lose out, even if a court *would have* found them sufficient to mandate a federal rule.

Finally, certiorari is warranted because the decision below is wrong. Because both looking to state law and the weighing approach substantially disrupt federal class action practice, federal common law must govern the tolling effect of a federal class action on non-federal claims subsequently filed in federal court. Class tolling is a rule of judicial administration and procedure, which does not alter the external conduct or the rights and duties of parties, it is thus properly an issue of federal law in diversity cases, which need not yield to contrary state law. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (holding that "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity"); *see generally* Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813 (2008).

Reasons for Granting an Extension of Time

The time to file a petition for a writ of certiorari should be extended for 30 days for the following reasons:

1. The press of other matters before this and other courts makes the existing deadline on February 13, 2022, difficult to meet. Petitioners have recently retained Supreme Court counsel to assist in preparing this petition. Additional time is required to allow counsel to study the record and prepare a concise petition for the Court's review. Moreover, Supreme Court counsel has also recently been retained to represent the respondent in *Slack Technologies, LLC v. Pirani*, No. 22-200, the merits brief in which is due on February 27, 2023. Petitioners' other counsel have two major

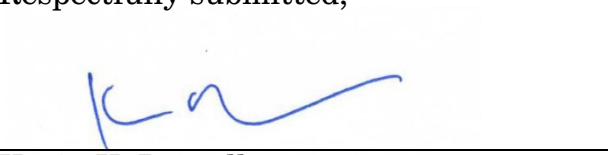
briefs due—on February 8 and February 23—in the ongoing MDL from which this petition sprung.

2. Whether or not the extension is granted, the petition will be considered during this Term—and, if the petition were granted, it would be argued in the next Term. The extension is thus unlikely to substantially delay the resolution of this case or prejudice any party.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended for 30 days to and including March 15, 2023.

Respectfully submitted,



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