No.

IN THE

# Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

*Petitioner,*

v.

TODD DEGEER,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), this Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."

This case involves a certified class action where the class was narrowed and then decertified. The Eighth Circuit held, consistent with the Fifth and Ninth Circuits, but in conflict with the Fourth and Tenth Circuits, that in this situation *American Pipe* tolling should be extended beyond "members of the class" to include persons who were *not* "members of the class" so long as they were not "unambiguously exclude[d]" from the class. App. 2a.

The question presented is:

Is *American Pipe* tolling limited to actual members of the putative or certified class, or does it extend to non-class members so long as they were not "unambiguously excluded" from the class?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. All parties to the proceeding are named in the caption.

2. Petitioner Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation.

## RELATED PROCEEDINGS

United States District Court (D. Neb.):

*DeGeer v. Union Pac. R.R. Co.*,

No. 8:23-cv-10 (June 21, 2023)

United States Court of Appeals (8th Cir.):

*DeGeer v. Union Pac. R.R. Co.*,

No. 23-2625 (Sept. 3, 2023)

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## OPINIONS BELOW

The opinion of the court of appeals (App. 1a–12a) is reported at 113 F.4th 1035. The order of the district court on Union Pacific's motion for summary judgment (App. 13a–27a) is not published in the Federal Supplement but is available at 2023 WL 4535197.

## JURISDICTION

The court of appeals entered its judgment on September 3, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## INTRODUCTION

This case presents the familiar problem of *American Pipe* creep. Twice in recent years, this Court has stepped in to caution against expansive readings of *American Pipe* that had allowed equitable tolling in situations beyond what this Court had originally contemplated. *See China Agritech, Inc. v. Resh*, 584 U.S. 732 (2018); *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497 (2017). The Eighth Circuit's attempt to expand *American Pipe* requires this Court's intervention.

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974), this Court held that "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class." Thus, members of a putative class could still file otherwise-untimely individual lawsuits in the event the class was not certified or was decertified.

In this case, respondent brought an individual lawsuit after the Eighth Circuit decertified a class

action against Union Pacific. *See Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030 (8th Cir. 2020). The district court dismissed respondent's claim as untimely, rejecting respondent's argument that the decertified class action entitled him to *American Pipe* tolling. The district court gave a simple reason: Respondent had not been a member of the decertified class. App. 25a–26a.

The Eighth Circuit reversed. Adopting the Ninth Circuit's rule from *DeFries v. Union Pacific Railroad Co.*, 104 F.4th 1091, 1097 (9th Cir. 2024), the court held that the question was *not* whether respondent had been a member of the decertified class. Rather, the Eighth Circuit explained, the question was whether respondent had *arguably* been a member of the decertified class. In the view of the court of appeals, even if respondent had not been a member of the decertified class, he could still claim *American Pipe* tolling so long as he had not been "unambiguously exclude[d]" from the class. App. 6a.

Soon after the Eighth Circuit's decision, the Fifth Circuit followed suit and similarly adopted the *DeFries* rule of "unambiguous exclusion." *See Zaragoza v. Union Pac. R.R. Co.*, 112 F.4th 313 (5th Cir. 2024).

The rule in the Fifth, Eighth, and Ninth Circuits—authorizing *American Pipe* tolling for persons who were not members of the class—directly conflicts with the rule in the Fourth and Tenth Circuits. Those courts hold that *American Pipe* tolling is available only to class members—even in cases like this one, where the class definition was narrowed. *See Smith v. Pennington*, 352 F.3d 884, 893 (4th Cir. 2003)

(persons claiming tolling "must have been members of the class [the named plaintiff] sought to have certified"); *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248, 254 (10th Cir. 1994) (because plaintiff "would not have been a party to the [proposed class actions] had any of them continued as a class action," the "statute of limitations should not be tolled").

This Court should dispel the confusion in the circuits and definitively resolve what one court has described as "a difficult issue that has divided courts for decades." *Zaragoza v. Union Pac. R.R. Co.*, 606 F. Supp. 3d 427, 435 (W.D. Tex. 2022), *rev'd*, 112 F.4th 313. As the Ninth Circuit has acknowledged, this problem "has split many district courts, including those addressing the same *Harris* class action against Union Pacific." *DeFries*, 104 F.4th at 1097.

Putting aside the circuit split, review is warranted for an additional reason: The Eighth Circuit's decision is directly at odds with *American Pipe* itself. There the Court said: "We hold that . . . the commencement of the original class suit tolls the running of the statute for all purported *members of the class* who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U.S. at 552–53 (emphasis added); *see also id*. at 554 ("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted *members of the class* who would have been parties had the suit been permitted to continue as a class action.") (emphasis added). There is simply no way to read *American Pipe* as authorizing tolling for persons who are *not* "members of the class."

This case is strikingly similar to *China Agritech*. There, the Ninth Circuit extended *American Pipe* to encompass piggyback class actions—using tolling from one class action to toll the time to bring a new class action. This Court "granted certiorari in view of a division of authority among the Courts of Appeals over whether otherwise-untimely successive class claims may be salvaged by *American Pipe* tolling." 584 U.S. at 738 (citation omitted). The Court reversed the Ninth Circuit, adhering to the limited scope of tolling it had recognized in *American Pipe*, and pointedly noted that none of the Court's prior decisions "so much as hints that tolling extends to otherwise time-barred class claims." *Id*. at 740. Here too, the Eighth Circuit has extended equitable tolling in a way that not only conflicts with the rule in other circuits, but conflicts with *American Pipe* itself by automatically tolling statutes of limitations for persons who were not "members of the class," 414 U.S. at 554. This Court should grant review.

## STATEMENT

This petition arises from a lawsuit that respondent brought against Union Pacific after the Eighth Circuit's decertification of the *Harris* class. The district court granted summary judgment to Union Pacific on the ground that respondent was not a member of the class that was certified in *Harris*. On appeal, the Eighth Circuit reversed the district court, holding that respondent was entitled to *American Pipe* tolling because he had not been "unambiguously exclude[d]" from the *Harris* class. App. 6a.

### A. The *Harris* Class Action

In *Harris*, the plaintiffs sued on behalf of a class of current and former Union Pacific employees who alleged that the railroad violated provisions of the Americans with Disabilities Act (ADA) in connection with its use of standardized tests to determine if employees were fit for duty.

The original class definition in *Harris* was broad. As framed in the complaint, it encompassed all current and former Union Pacific employees who had experienced an adverse employment event as a result of a fitness-for-duty examination. *See Harris v. Union Pac. R.R. Co.*, 329 F.R.D. 616, 621 (D. Neb. 2019). But when the plaintiffs moved for class certification, they proposed a narrower class of only those current and former employees who had experienced an adverse employment event as a result of a fitness-for-duty examination *administered in connection with a* "*reportable health event.*" *Id.* (emphasis added). The district court adopted that narrowed class definition in its order certifying the class. *Id.*

On interlocutory appeal, the Eighth Circuit decertified the class. *Harris v. Union Pacific R.R. Co.*, 953 F.3d 1030 (8th Cir. 2020).

### B. Proceedings In The District Court

In 2012, a Union Pacific engineer with a color-vision deficiency misidentified a signal, causing a fatal head-on collision between two trains. App. 15a. At the time of the accident, Union Pacific tested the color vision of employees in safety-sensitive positions using the industry-standard exam known as the Ishihara test. App. 14a. If an employee failed the Ishihara test, they were referred to secondary

screening and required to pass another color-vision test in order to maintain their job with the railroad. App. 14a. After the accident, in compliance with recommendations from the National Transportation Safety Board, Union Pacific adopted a newer, tougher secondary-screening test—a "light cannon" field test—for employees who failed the Ishihara test. App. 15a–17a.

Respondent is a former Union Pacific employee who had repeatedly failed the Ishihara test but had been able to pass the original secondary-screening test. App. 15a. After Union Pacific strengthened its secondary-screening approach by adopting the light cannon test, respondent failed the light cannon test and was removed from his safety-sensitive position. App. 17a. Respondent sued Union Pacific under the ADA, alleging that his removal from a safety-sensitive position was an unlawful adverse employment action. App. 20a.

Union Pacific moved for summary judgment on the grounds that respondent's claim was untimely. App. 20a–21a. Respondent did not dispute that his claim fell well outside the ADA's statute of limitations. But he argued that the statute of limitations had been equitably tolled under *American Pipe* because he had been a class member in the *Harris* litigation. App. 20a.

Thus, whether respondent's claim was timely depended on whether he was a member of the narrowed class certified by the district court. If respondent *was* a class member, the statute of limitations was tolled until the Eighth Circuit decertified the class. But if respondent was *not* a class member, his claim was untimely.

The district court granted Union Pacific summary judgment on the basis that respondent had not been a member of the *Harris* class. App. 25a–26a. The court reached that conclusion on the grounds that respondent's adverse employment action did not arise from a "reportable health event." App. 26a. His failure to pass the light cannon test arose from longstanding color-vision deficiencies and was not itself a "reportable health event." App. 26a.

### C. The Eighth Circuit's Decision

The Eighth Circuit reversed the district court. The court began by noting that it had "rarely considered the contours of *American Pipe* tolling," and "ha[d] never addressed this issue." App. 6a. The court framed the question presented as whether respondent's claims were tolled during the period after the narrowing of the class definition had "arguably kick[ed] him out of the class." App. 6a.

Although the Eighth Circuit acknowledged that *American Pipe* limited the availability of tolling to "'members of the class who would have been parties had the suit been permitted to continue as a class action,'" App. 5a (quoting 414 U.S. at 554), the court of appeals took a more expansive approach. It noted that, in cases where the class definition is narrowed, there could be ambiguity in whether particular persons—so-called "bystander plaintiffs" who were arguably encompassed within the original, broader class definition—remain members of the class. App. 6a. The court concluded that "'anything short of unambiguous narrowing would undermine the balance contemplated by the Supreme Court' in *American Pipe* and is insufficient to exclude a plaintiff

from a class for tolling purposes." Ap. 7a (quoting *DeFries*, 104 F.4th at 1099).

Thus, the Eighth Circuit held, in agreement with the Ninth Circuit, "[w]here the scope of the class definition in an initial complaint 'arguably' includes particular bystander plaintiffs, they remain entitled to *American Pipe* tolling unless and until a court accepts a new definition that *unambiguously excludes* them." App. 6a (emphasis added). In other words, *American Pipe* tolling does not end for a particular bystander plaintiff because of a narrowed class definition; rather, a court must adopt a new definition that "*unambiguously exclude[s]*" that bystander plaintiff in order for the tolling period to end. App. 6a (quotation marks omitted and emphasis added). Even if the new class definition excludes the bystander plaintiff—*i.e.*, even if the bystander plaintiff is no longer a member of the class—that bystander plaintiff is still entitled to *American Pipe* tolling unless the exclusion can be deemed "unambiguous."

The court stressed that *American Pipe* tolling "furthers the efficiency purpose of class actions by disincentivizing plaintiffs wary of an adverse certification decision from filing needless protective suits." App. 5a. "To hold otherwise," the court explained, "would frustrate the purpose of the [*American Pipe*] rule" by "require[ing] bystander plaintiffs . . . 'to follow the class action closely, looking for any change in the class definition and carefully parsing what it might mean.'" App. 10a (quoting *DeFries*, 104 F.4th at 1099).

The court thus agreed with the district court that it is a "close call" whether respondent was a member

of the narrowed *Harris* class; but it concluded that it "*need not decide*" whether respondent actually was a member of the relevant class because of the "genuine ambiguity" in the class definition. App. 10a (quoting *DeFries*, 104 F.4th at 1107).

The Eighth Circuit then applied its rule of "unambiguous exclusion" to the case before it. The court did not decide whether respondent was actually a member of the class under the certified definition—*i.e.*, the court did not decide whether he was a "member[] of the class who would have been [a] part[y] had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554. The court stated that "what matter[ed]" was "the 'genuine ambiguity' in the [class] definition's scope.'" App. 10a (quoting *DeFries*, 104 F.4th at 1107). But there was no need to decide that question because under the Eighth Circuit's rule, the court needed only to determine that "the *Harris* class did not unambiguously exclude DeGeer when the district court certified it under a narrowed definition," and that respondent was therefore entitled to tolling without having to establish class membership. App. 10a.

The court held that because respondent was not "unambiguously exclude[d]" from the class definition, "it was reasonable for him to rely on the *Harris* class" for tolling, and that no further inquiry was needed. App. 10a.

## REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve the circuit split on an important and recurring question concerning equitable tolling in class actions—and

because the Eighth Circuit's approach improperly extends, and conflicts with, *American Pipe* and other decisions of this Court. The question is cleanly presented and there are no vehicle problems.

## I. The Circuits Are Split Over The Correct Application Of *American Pipe* To Narrowed Class Definitions.

The courts of appeals have split as to how *American Pipe* tolling applies to cases where a class definition has been narrowed. The Fifth, Eighth, and Ninth Circuits ask whether the bystander plaintiff has been "unambiguously excluded" from the narrowed class definition. The Fourth and Tenth Circuits, in contrast, ask simply whether the bystander plaintiff was a class member under the narrowed class definition.

**A.** The Ninth Circuit was the first to address an individual action brought by a color-vision plaintiff after the *Harris* decertification, and it held that unless bystander plaintiffs are "unambiguously exclude[d]" from the class definition, they are entitled to *American Pipe* tolling. In the Ninth Circuit's view, "to end *American Pipe* tolling for a particular bystander plaintiff based on a revised class definition, a court must adopt a new definition that *unambiguously excludes* that bystander plaintiff." 104 F.4th at 1099 (emphasis added and quotation marks omitted).

After the Ninth Circuit's decision, both the court of appeals below and the Fifth Circuit adopted the Ninth Circuit's "unambiguously excludes" rule. *See Zaragoza v. Union Pac. R.R. Co.*, 112 F.4th 313 (5th Cir. 2024). All three cases arose in the same factual

posture—they were cases in which color-vision plaintiffs claimed their individual ADA claims against Union Pacific were timely because the statute of limitations had been tolled by the *Harris* class action. In all three cases, the district courts dismissed the plaintiff's claims as untimely. And in *Zaragoza*, as here, the circuit court adopted the Ninth Circuit's rule and reversed the district court.

In *Zaragoza*, the Fifth Circuit held that the plaintiff's individual claims were timely because "the class definition does not unambiguously exclude Zaragoza." 112 F.4th at 322. The court quoted the Ninth Circuit's opinion in *DeFries* in concluding: "Ending *American Pipe* tolling with anything short of unambiguous narrowing would undermine the balance contemplated by the Supreme Court by encouraging putative or certified class members to rush to intervene as individuals or to file individual actions." *Id*. (cleaned up). The court explained that "based on our assessment of Zaragoza's claims, the class definition certified by the *Harris* district court included him. At least, given the record before us, Zaragoza was not '*unambiguously excluded*' from the *Harris* certified class." *Id*. (quoting *DeFries*, 104. F.4th at 1105 (emphasis added by Fifth Circuit)).

**B.** The Fourth and Tenth Circuits take a different approach: They simply ask whether the bystander plaintiff was a member of the narrowed class. If so, then the bystander plaintiff can claim *American Pipe* tolling; if not, then the bystander plaintiff cannot claim *American Pipe* tolling. Ambiguities in the class definition may make it more difficult for the court to determine whether a bystander plaintiff was a class member. But the mere existence of ambiguity does

not *entitle* the bystander plaintiff to *American Pipe* tolling, as it does in the Fifth, Eighth, and Ninth Circuits. Consistent with *American Pipe*, tolling simply depends on whether the bystander plaintiff was a member of the putative class.

In *Smith v. Pennington*, 352 F.3d 884, 896 (4th Cir. 2003) (Luttig, J.), the court held that bystander plaintiffs were not entitled to *American Pipe* tolling because they "were not members of the class" sought to be certified. The court explained that under *American Pipe*, "even though a plaintiff's desired class has been denied certification, *parties who were putative members of that class* may file timely motions for intervention after that denial and be eligible to have the statute of limitations tolled on their claims." *Id*. at 892 (emphasis added); *see also id*. at 892–93 ("we have held that persons *who were members of the named plaintiff's asserted class* . . . were entitled to tolling") (emphasis added). Therefore, the court explained, before they can claim *American Pipe* tolling, bystander plaintiffs "must have been members of the class [the named plaintiff] sought to have certified." *Id*. at 893. Applying that standard in a case where the district court adopted a narrower class definition than the one proposed in the complaint, the court concluded: "We therefore hold that because appellants *were not members of the class* [the named plaintiff] sought to have certified for over a year prior to their seeking intervention, their . . . claims were not entitled to tolling for that period and, consequently, were time-barred." *Id*. at 896 (emphasis added).

In *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248 (10th Cir. 1994), the court held the bystander plaintiff was not entitled to *American Pipe* tolling

because she was not a member of any of several proposed class actions in Minnesota. The court explained that the *American Pipe* "doctrine suspends application of the statute of limitations *to putative class members* while a decision on class certification is pending." *Id*. at 253 (emphasis added); *see also id*. ("[t]he filing of a class action suit tolls the statute of limitations for all *asserted class members"*) (emphasis added). The court acknowledged that the plaintiff had *believed* she was a class member—and further acknowledged that "the complaints filed in the Minnesota class actions were broad in their descriptions of the class" and arguably encompassed the plaintiff—but it nonetheless held that she was not a member of the narrowed class ultimately sought to be certified and thus could not claim tolling. *Id*. The court concluded that because the plaintiff "has presented no evidence supporting the inference she was a putative member of the class," she "would not have been a party to the Minnesota suits had any of them continued as a class action." *Id*. at 253–54. And because the plaintiff was not a member of the narrowed class—even if she may have been encompassed within the originally proposed "broad" class—"[t]he statute of limitations should not be tolled." *Id*.

**C.** The Fourth and Tenth Circuits' views are consistent with *American Pipe*, which limits the availability of equitable tolling to members of the class. Under the approach followed in the Fifth, Eighth, and Ninth Circuits, persons who are *not* class members may still obtain equitable tolling—a result inconsistent with *American Pipe* and basic equitable principles. This Court should grant review to resolve

the split and hold that, consistent with *American Pipe*, only members of the class may claim equitable tolling.

## II. The Eighth Circuit's Decision Improperly Extends, And Conflicts With, *American Pipe*.

Review is warranted for an additional and independent reason: The Eighth Circuit's decision conflicts with *American Pipe* and its progeny by allowing persons who are not class members to claim equitable tolling. The Eighth Circuit's decision dramatically broadens the availability of equitable tolling to situations where it is not warranted and takes *American Pipe* well beyond anything this Court has authorized. The Eighth Circuit's ruling is not aberrational. Because three circuits have now adopted a tolling rule that conflicts with and impermissibly expands *American Pipe*, this Court should grant review.

**A.** The decision below conflicts with *American Pipe*. This Court stated—repeatedly—that equitable tolling was available to actual members of the putative class, not to those who wished to members, or believed themselves to be members in light of an ambiguous class definition. The Court stated its holding plainly:

> We hold that in this posture, at least where class action status has been denied solely because of failure to demonstrate that the class is so numerous that joinder of all members is impracticable, the commencement of the original class suit tolls the running of the statute *for all purported members of the class* who make timely

> motions to intervene after the court has found the suit inappropriate for class action status.

414 U.S. at 553 (emphasis added and quotation marks omitted). The Court then emphasized the limited scope of its opinion by stating (again) that only actual members of the class could claim equitable tolling: "We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to *all asserted members of the class who would have been parties had the suit been permitted to continue as a class action*." *Id*. at 554 (emphasis added). In short, the Court limited the availability of tolling to persons who fall within the class definition and were actually members of the class or putative class.

In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court restated the "holding" of *American Pipe*: "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 (quoting 414 U.S. at 554) (emphasis added). The Court elaborated:

> Once the statute of limitations has been tolled, it remains tolled for *all members of the putative class* until class certification is denied. At that point, *class members* may choose to file their own suits or to intervene as plaintiffs in the pending action.

*Id.* at 354 (emphases added). The Court then held that the plaintiff was entitled to *American Pipe* tolling because he had actually been a member of the putative class. *See id*. ("[R]espondent clearly would

have been a party in [the putative class action] if that suit had been permitted to continue as a class action."). The Court thus reaffirmed the dividing line established in *American Pipe*: Persons who were members of the putative class are entitled to equitable tolling; persons who were not are not.

In *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 582 U.S. 497 (2017), the Court held that the plaintiffs could not invoke *American Pipe* to toll the Securities Act's three-year statute of repose. The Court explained that "the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions." *Id.* at 509. Because "[t]he purpose and effect of a statute of repose . . . is to override customary tolling rules arising from the equitable powers of courts," the Securities Act's statute of repose overrides any claim to *American Pipe* tolling. *Id.* at 508. The Court dismissed as "overstated" the plaintiff's "concerns" that "nonnamed class members will inundate district courts with protective filings," noting there was no "evidence of any recent influx of protective filings in the Second Circuit, where the rule affirmed here has been the law" for years. *Id.* at 513.

Finally, in *China Agritech, Inc. v. Resh*, 584 U.S. 732 (2018), the Court held that *American Pipe* did not allow piggyback tolling—a plaintiff could not invoke *American Pipe* to use one class action to toll the time for bringing another class action. The Court began by stating what it "held in *American Pipe*": "[T]he timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint." *Id.* at 735. "Where class-action status has

been denied . . . *members of the failed class* could timely intervene as individual plaintiffs in the still-pending action, shorn of its class character." *Id*. (emphasis added). The Court observed that later, in *Crown, Cork & Seal*, it "clarified" that the tolling rule "applies as well to *putative class members* who, after denial of class certification, 'prefer to bring an individual suit rather than intervene.'" *Id*. (quoting 462 U.S. at 350) (emphasis added)). But the Court emphasized that "[n]either decision so much as hints that tolling extends to otherwise time-barred class claims." *Id*. at 740. Thus, the Court held, "*American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action." *Id*.

**B.** The decision below conflicts with this Court's precedents by allowing persons who are not class members to claim equitable tolling. For decades, this Court has said that *American Pipe* tolling applies to "all asserted members of the class," 414 U.S. at 554, "all members of the putative class," *Crown, Cork & Seal*, 462 U.S. at 354, "individuals who otherwise would have been members of the class," *ANZ Sec*., 582 U.S. at 508, and "members of the failed class," *China Agritech*, 584 U.S. at 735.

Just as in *China Agritech*, none of this Court's decisions "so much as hints that tolling extends to" persons who are *not* class members. 584 U.S. at 740. The Eighth Circuit was wrong to extend *American Pipe* to persons who are not class members so long as they have not been "unambiguously exclude[d]" from the class. The Eighth Circuit's decision also swims against the tide of this Court's recent rulings rejecting attempts to expand the scope of *American Pipe* tolling.

The correct approach—the approach consistent with *American Pipe* and its progeny—is the one followed by the Fourth and Tenth Circuits. Those courts simply ask if the bystander plaintiff was a member of the class. Even in cases where the class definition has been narrowed—and even where the narrowed class definition is ambiguous—courts can apply all the traditional tools of interpretation and decide whether the person is encompassed within the class definition. There is no need for a thumb-on-the-scale rule that any "ambiguities are resolved in favor of applying *American Pipe* tolling." App. 6a.

The Eighth Circuit's rule—that an ambiguously narrowed class definition automatically entitles a bystander plaintiff to equitable tolling—is inconsistent with traditional principles of equity. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). An automatic-tolling rule that extends to non-class members so long as they were not "unambiguously excluded" from the class relieves plaintiffs from having to prove either element. The Eighth Circuit's automatic-tolling rule makes equitable tolling an easily-obtained group entitlement rather than the hard-fought individual remedy it has traditionally been. To be sure, *American Pipe* tolling is itself a group remedy, but the Eighth Circuit should have exercised caution before expanding the size of the group entitled to claim it.

The Eighth Circuit's rationale—that not allowing *American Pipe* tolling would prompt a flood of

"needless protective suits," App. 5a—has been repeatedly rejected by this Court. In *ANZ Securities*, 582 U.S. at 513, the Court dismissed this precise concern as "overstated," noting that the Second Circuit had a no-tolling rule in place for years and there was no evidence of an increase in lawsuits. And in *China Agritech*, the Court again rejected this exact argument, similarly observing that several circuits had long had a no-tolling rule in place, and there was "no showing that these Circuits have experienced a disproportionate number of duplicative, protective class-action filings." 584 U.S. at 746.

This case bears striking similarities to *China Agritech*. There, as here, the court of appeals significantly expanded the availability of *American Pipe* tolling. There, as here, the court of appeals' rule conflicted with the rule adopted in other circuits. There, as here, the court of appeals justified its rule on the basis of efficiency and concern over a flood of protective filings. And there, as here, the court of appeals' rule conferred an entitlement to equitable tolling to a broad group that went well beyond the limited group this Court allowed in *American Pipe*. As the *China Agritech* Court stated: "Plaintiffs have no substantive right to bring their claims outside the statute of limitations. That they may do so, in limited circumstances, is due to a judicially crafted tolling rule." 584 U.S. at 745–46. Just as this Court granted review to rein in the Ninth Circuit's expansion of this "judicially crafted tolling rule" in *China Agritech*, it should do so here.

## III. This Case Is An Ideal Vehicle For Resolving The Circuit Split And Confirming The Scope Of *American Pipe* Tolling.

This case raises "a difficult issue that has divided courts for decades." *Zaragoza v. Union Pac. R.R. Co.*, 606 F. Supp. 3d 427, 435 (W.D. Tex. 2022), *rev'd*, 112 F.4th 313. The question presented has now been addressed and resolved in inconsistent ways by the Fourth, Fifth, Eighth, Ninth, and Tenth Circuits. Absent this Court's intervention, *American Pipe* tolling will be applied in starkly contrasting ways across different circuits. The Eighth Circuit's rule is a significant expansion of the equitable exception created by *American Pipe*, and it casts aside Justice Powell's warning that *American Pipe*'s "generous" tolling rule "invit[es] abuse," and that it must not be read broadly so as to "leav[e] a plaintiff free to raise different or peripheral claims following denial of class status." *Crown, Cork & Seal*, 462 U.S. at 354 (Powell, J., concurring).

This Court has repeatedly recognized that the availability of *American Pipe* tolling presents an important question of federal law. It granted review in *ANZ Securities* and again a term later in *China Agritech*. The Court also granted review in *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250 (2016). There, the Federal Circuit adopted a rule governing equitable tolling that conflicted with the rule followed in the D.C. Circuit. *See id.* at 255. Even though that circuit split was far less mature than the split presented here, in light of the importance of a uniform rule governing equitable

tolling in the federal courts, this Court "granted certiorari to resolve the conflict." *Id*.

The question presented here is not just important but recurring. It has been addressed by five circuits and numerous district courts; the Fifth, Eighth, and Ninth Circuit decisions together decided five separate district court cases. And litigants in those circuits where the question has not yet been addressed must guess which rule their circuit will adopt.

There are no vehicle problems. The question is cleanly presented and the Eighth Circuit's opinion provides a clear account of the basis for its ruling. There are no disputed factual issues that would complicate this Court's resolution of the pure question of law presented here. And the Eighth Circuit's decision turned on whether respondents were entitled to *American Pipe* tolling. This case is therefore an ideal vehicle for resolving the circuit split and ensuring that three circuits do not continue to apply a rule that conflicts with *American Pipe* and basic principles of equitable tolling.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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December 2, 2024

# APPENDIX

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## APPENDIX A

**UNITED STATES COURT OF APPEALS**
**For the Eighth Circuit**

No. 23-2625

Todd DeGeer

*Plaintiff – Appellant*

v.

Union Pacific Railroad Co.

*Defendant - Appellee*

Public Justice

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*Amicus on Behalf of Appellant(s)*

Appeal from United States District Court
for the District of Nebraska – Omaha

Submitted: May 7, 2024

Filed: September 3, 2024

Before SMITH, KELLY, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

A group of Union Pacific Railroad Company employees brought a class action against the company alleging that its fitness-for-duty program violated the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a), (b)(6). Todd DeGeer thought he was a member of that class. When we decertified it, he filed an Equal Employment Opportunity Commission (EEOC) charge and an individual suit, believing that *American Pipe & Construction Co. v. Utah* tolled his claims. 414 U.S. 538 (1974). The district court disagreed and found that DeGeer was not a member of the class as narrowly defined in the certification order, so it dismissed his individual claims as untimely. But because the revised definition did not unambiguously exclude DeGeer, we reverse and remand.

## I.

Union Pacific has a fitness-for-duty program to make sure that employees can "[s]afely perform a job, with or without reasonable accommodations," and "[m]eet medical standards established by regulatory agencies in accordance with federal and state laws." The Federal Railroad Agency mandates regular testing to assess whether employees in safety-sensitive positions can "recognize and distinguish between the colors of railroad signals" by using one of an approved list of tests. 49 C.F.R. § 242.117(h)(3). If an employee fails that test, he may be sent for "further medical evaluation by a railroad's medical examiner to determine" if he can still safely perform, including a "retest." § 242.117(j). Union Pacific used the Ishihara test, and if a worker failed it, he could take a color vision field test. But after a deadly railroad crash, Union Pacific updated its fitness-for-duty program. It created a new secondary test, which

allegedly doesn't model real-world conditions or pass minimum validation standards.

Despite his longstanding color vision deficiency, DeGeer worked at Union Pacific for years without incident—most recently as a conductor, a safety-sensitive position. When he had taken the signal tests in the past, he typically failed the Ishihara test and passed a secondary test. But after Union Pacific replaced the secondary test, DeGeer failed both. Though he insists that he can still do the job of a conductor, Union Pacific removed him from service in June 2017, imposed permanent work restrictions, and barred him from working in any job where he would have to identify traffic signals.

Over a year before that happened, former Union Pacific employees filed a class action alleging that the company's fitness-for-duty policies and practices violated the ADA. *See Harris v. Union Pac. R.R. Co.,* 329 F.R.D. 616, 620-21 (D. Neb. 2019). DeGeer wasn't a named plaintiff, but he was aware of the suit and was one of 44 employees to submit a declaration with the plaintiffs' certification motion. Although the class definition changed over time, DeGeer always thought that he was a member.

The operative complaint defined the class as Union Pacific employees who "were removed from service over their objection, and/or suffered another adverse employment action . . . for reasons related to a Fitness-for-Duty evaluation." There is no question that DeGeer was a member of the class under this definition. But Union Pacific thought it was too broad. So in response to discovery requests, it provided a list of employees who were subject to a fitness-for-duty evaluation "related to a Reportable Health Event." Union Pacific's medical rules define a reportable

health event as "any new diagnosis, recent events, and/or change" in a list of conditions including "significant vision or hearing changes." DeGeer was on the list.

When plaintiffs moved to certify the class, though, the definition changed again. Rather than employees subject to a fitness-for-duty evaluation "related to" a reportable health event, the proposed class included "[a]l1 individuals who ha[d] been or w[ould] be subject to a fitness-for-duty examination *as a result of* a reportable health event at any time from September 18, 2014 until the final resolution of *[Harris]." Id.* at 628 (emphasis added). The *Harris* district court certified the class under this narrowed definition. *Id.* at 627-28.

After we reversed certification, *Harris v. Union Pac. R.R. Co.,* 953 F.3d 1030 (8th Cir. 2020), DeGeer filed an EEOC charge. He then filed suit, alleging violations of the ADA and seeking a declaration that he was a member of the *Harris* class. If DeGeer's claims were tolled during the pendency of the *Harris* class, his suit was timely. But in its motion for judgment on the pleadings, Fed. R. Civ. P. 12(c), Union Pacific argued that DeGeer was not a member of the class as certified and so was not entitled to *American Pipe* tolling. The court agreed, focusing on language in DeGeer's declaration that "Union Pacific required [him] to undergo a fitness for duty evaluation *as part of [his] routine FRA recertification"*—that is, not "as a result of" a reportable health event. So while DeGeer was waiting to see how the *Harris* appeal would play out, the clock was ticking. By the time he filed his EEOC charge, he had blown past the 300-day deadline. *See* 42 U.S.C. § 2000e-5(e)(1). The court dismissed his claims as time-barred, and this appeal

follows.

## II.

"[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Am. Pipe,* 414 U.S. at 554. "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 354 (1983). So long as asserted class members maintain their status, they enjoy the benefit of *American Pipe* tolling when they file an otherwise untimely individual suit. *Id.* at 350.

The *American Pipe* tolling rule is "grounded in the traditional equitable powers of the judiciary." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.,* 582 U.S. 497, 509 (2017). It furthers the efficiency purpose of class actions by disincentivizing plaintiffs wary of an adverse certification decision from filing needless protective suits. See *Am. Pipe,* 414 U.S. at 550, 556 (observing that federal class actions are designed to promote "litigative efficiency and economy" and "avoid, rather than encourage, unnecessary filing of repetitious papers and motions"). And it serves the reliance interests that statutes of limitations aim to protect. *See Crown, Cork,* 462 U.S. at 352-53. By filing a class action, named plaintiffs put defendants on notice of "the substantive claims being brought against them" and "the number and generic identities of the potential plaintiffs who may participate in the judgment." *Id.* at 353 (quoting *Am. Pipe,* 414 U.S. at 555). And by relying on the class to press their claims, asserted class members "cannot be accused of sleeping on their rights." *Id.* at 352.

No one disputes that that tolling ended for the entire *Harris* class when we reversed certification. The only question is whether it ended for DeGeer sooner—when the district court certified the class under a narrower definition than pleaded, arguably kicking him out of the class. We have rarely considered the contours of *American Pipe* tolling, and we have never addressed this issue. But other courts have.

Following the decertification of the *Harris* class, the Ninth Circuit held that "[w]here the scope of the class definition in an initial complaint 'arguably' includes" the plaintiff, he "remain[s] entitled to *American Pipe* tolling unless and until a court accepts a new definition that unambiguously excludes them." *DeFries v. Union Pac. R.R. Co.,* 104 F.4th 1091, 1099 (9th Cir. 2024). Any ambiguities are resolved in favor of applying *American Pipe* tolling. *Id.* at 1100. Applying this test, the court found that the narrowed definition did not unambiguously exclude its color vision appellant. *Id.* at 1106-07. "[E]xtratextual evidence" that the parties and the *Harris* district court treated him as a putative class member reinforced that finding. *Id.* at 1108-09.

The Fifth Circuit came out much the same way. Unlike *DeFries,* it found that for tolling purposes, the *Harris* district court certified an "expansive" class that included the color vision appellant. *Zaragoza v. Union Pac. R.R. Co.,* — F.4th —, 2024 WL 3755612, at *5 (5th Cir. Aug. 12, 2024). It based its finding on the district court's treatment of the list Union Pacific provided and the 44 declarants. *Id.* But it also agreed with *DeFries* that only an unambiguous exclusion from the class could end *American Pipe* tolling. And "even considering the matter afresh," it found that the

narrowed definition did not unambiguously exclude the appellant. *Id.* at *6.

To be sure, a district court may limit an asserted class by certifying it under a definition that is unambiguously narrower than originally pleaded. *See Smith v. Pennington,* 352 F.3d 884, 894 (4th Cir. 2003). But we will not consider a plaintiff's individual interests abandoned unless there is a class certification decision that "definitively excludes" him. *Choquette v. City of New York,* 839 F. Supp. 2d 692, 699 (S.D.N.Y. 2012). We join our sister circuits in holding that "anything short of unambiguous narrowing would undermine the balance contemplated by the Supreme Court" in *American Pipe* and is insufficient to exclude a plaintiff from a class for tolling purposes. *DeFries,* 104 F.4th at 1099; *see also Zaragoza,* 2024 WL 3755612, at *6 (quoting *DeFries,* 104 F.4th at 1099); *Pennington,* 352 F.3d at 894.

**III.**

We review the grant of judgment on the pleadings *de novo,* accepting the non-movant's factual allegations as true, granting all reasonable inference in his favor, and applying the same standards that govern a Rule 12(c) motion to dismiss. *Ellis v. City of Minneapolis,* 860 F.3d 1106, 1109 (8th Cir. 2017). We may look beyond the complaint to determine the scope of the class. *See Pennington,* 352 F.3d at 891; *Sawtell v. E.I. du Pont de Nemours and Co.,* 22 F.3d 248, 253 (10th Cir. 1994).

"The theoretical basis on which *American Pipe* rests is the notion that class members are treated as parties to the class action." *In re WorldCom Sec. Litig.,* 496 F.3d 245, 255 (2d Cir. 2007). So once a district court certifies a class—having "found that the named

plaintiffs asserted claims that were 'typical of the claims or defenses of the class' and would 'fairly and adequately protect the interests of the class'"—"the claimed members of the class [stand] as parties to the suit until and unless they receive[] notice thereof' and decide to opt out. *Am. Pipe,* 414 U.S. at 550-51 (quoting Fed. R. Civ. P. 23(a)(3), (4)).

Here, the named plaintiffs asserted a class of over 7,000 Union Pacific employees. That number tracked the list Union Pacific provided in discovery, which included DeGeer. The district court called it a "class list," *Harris,* 329 F.R.D. at 627, but the railroad has steadfastly rejected this characterization. Resisting certification, it argued that the list was "significantly broader" than the narrowed class definition that the plaintiffs proposed. And it urged the court to deny certification in part because "[t]he putative class is wildly diverse in . . . the reasons for their [fitness-for-duty] evaluations."

Over Union Pacific's objections, the court certified the class, finding typicality and adequacy of representation. *Id.* at 624. It relied in part on the list of employees and "declarations from 44 *class members* who have experienced the discrimination alleged" in the complaint—one of whom was DeGeer. *Id.* at 624 & n.3 (emphasis added). It then ordered notices be sent to everyone on the "class list," though there is no evidence that they ever went out. *Id.* at 627-28. DeGeer was a claimed member of the broad class that the court certified, so he stood as a party to the suit. *Am. Pipe,* 414 U.S. at 551.

Our inquiry might end there. The district court considered DeGeer a member of the class it certified, so tolling applies. *See Zaragoza,* 2024 WL 3755612, at *7. But Union Pacific argues that the current dispute

over class membership requires us to parse its policies and decide for ourselves whether DeGeer was in the class. Because we cannot divorce the issue of membership from the efficiency and reliance purposes of *American Pipe* tolling, we reach the same result: DeGeer's individual claims were tolled until we decertified the *Harris* class.

Whether the narrowed definition excluded DeGeer turns on the kinds of subtle distinctions in language that are fodder for lawyers and quicksand for laymen. The parties spar, for example, over whether there was any material narrowing between the definition that governed the list of 7,000-plus employees—"related to" a reportable health event"—and the certified definition—"result of" a reportable health event." Union Pacific conceded to the *Harris* district court that the line was not exactly clear and separating out employees with a reportable health event that affected but did not trigger their fitness-for-duty evaluations was a difficult task.

But the real fight is in whether a failed agency-mandated test could also be a reportable health event triggering a fitness-for-duty evaluation. Union Pacific argues that DeGeer admitted in his declaration that his evaluation was "a part off" his FRA testing, not a reportable health event. And in any case, it says, he did not experience the kind of significant vision change needed to qualify as a reportable health event. DeGeer responds that failing the signal tests was a "new diagnosis"—color vision no longer sufficient to do the job—or at the very least, it indicated a possible vision change.

We agree with the district court here that whether the class definition included DeGeer is a "close call." Because we think both positions have merit, we need

not decide who has the right of the argument. *See DeFries,* 104 F.4th at 1107 (observing that "the better reading of the definition" is that failing the "color-vision testing protocol is a 'reportable health event'"); *Zaragoza,* 2024 WL 3755612, at *6 (finding that plaintiff's "failed Ishihara test in 2016 at least suggested that his previously certified color vision acuity may have no longer been passable, such that it met the definition of a 'reportable health event'"). What matters is the "genuine ambiguity" in the definition's scope. *DeFries,* 104 F.4th at 1107; *cf. Sawtell,* 22 F.3d at 253-54 (holding that *American Pipe* did not toll plaintiff's claim where she "presented no evidence supporting the inference she was a putative member" and "the narrowness of the class definitions was clear").

Because the *Harris* class did not unambiguously exclude DeGeer when the district court certified it under a narrowed definition, he was entitled to *American Pipe* tolling. To hold otherwise would frustrate the purposes of the rule. *American Pipe* does not require bystander plaintiffs like DeGeer "to follow the class action closely, looking for any change in the class definition and carefully parsing what it might mean." *DeFries,* 104 F.4th at 1099. He was a member of the original class that was not unambiguously narrowed when certified, so it was reasonable for him to rely[1] on the *Harris* class to continue to press his

[1] That isn't to say that the availability of *American Pipe* tolling turns on whether a plaintiff can show that he has pursued his "claims with requisite diligence." *Barryman-Turner v. District of Columbia*, 115 F. Supp. 3d 126, 132 (D.D.C. 2015). The Supreme Court explicitly disclaimed actual reliance. "[P]otential class members are mere passive beneficiaries of the action brought in their behalf' and even "asserted class members who were unaware of the proceedings brought in their interest or who

claims. *See Crown, Cork,* 462 U.S. at 352-53. And Union Pacific had notice of DeGeer and his claims. *See id.* Challenging certification of what it called a "sprawling" and "diverse" class, it pointed to the "personal stories of the 44 declarants" as justification for reversal because they revealed different triggering events for the fitness-for-duty evaluations and a "broad[] universe" of conditions, including "vision deficiencies."

Whether or not the *Harris* district court *should have* found that the narrowed definition excluded plaintiffs like DeGeer, no one—not the district court, not the named plaintiffs, not DeGeer, not even Union Pacific—thought that the court did. Statutory limitation periods are not "trap[s] for the unwary." *Am. Pipe,* 414 U.S. at 551 n.21 (citation omitted). They are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 554 (quoting *Ord. of R.R. Telegraphers v. Ry. Express Agency,* 321 U.S. 342, 348-49 (1944)). Union Pacific cannot claim surprise. Nor can DeGeer be accused of sleeping on his rights.

**IV.**

Because *American Pipe* tolled DeGeer's claims during the pendency of the *Harris* class, we reverse the district court's judgment and remand the case for further proceedings.

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demonstrably did not rely on the institution of those proceeding" enjoy the protections of this broad tolling rule. *Am. Pipe*, 414 U.S. at 551-52.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | |
|---|---|
| TODD DEGEER,<br>Plaintiff,<br>v.<br>UNION PACIFIC RAILROAD CO.,<br>Defendant. | **8:23CV10**<br>**MEMORANDUM AND ORDER** |

This matter is before the Court on plaintiff Todd DeGeer's ("DeGeer") Motion for Partial Summary Judgment (Filing No. 14) on defendant Union Pacific Railroad Co.'s ("UP") Statute of Limitations Defense. *See* Fed. R. Civ. P. 56; NECivR 56.1. Also pending before the Court is UP's Motion for Judgment on the Pleadings (Filing No. 33), in which UP argues DeGeer's claims are not only untimely but also fail on the merits. *See* Fed. R. Civ. P. 12(c). For the reasons stated below, DeGeer's motion is denied, and UP's motion is granted in part and denied in part.

### I. BACKGROUND

UP is a North American railroad headquartered in Omaha, Nebraska. Having joined UP in 1978, DeGeer most recently worked as a conductor in Phoenix, Arizona. DeGeer's job required him to read and interpret multicolored railroad traffic signal lights on signal masts. UP removed him from service

in approximately June 2017 reportedly to comply with its regulatory safety requirements.

UP is subject to the Federal Railroad Safety Act of 1970 ("FRSA"), 49 U.S.C. § 20101 *et seq.,* which promotes safety in railroad operations and seeks to reduce railroad accidents. The FRSA and its implementing regulations set "minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of" conductors. 49 C.F.R. § 242.1(b). As pertinent here, conductors must demonstrate the "ability to recognize and distinguish between the colors of railroad signals . . . by successfully completing one of the tests" described in the regulations. *Id. §* 242.117(h)(3).

If an examinee fails to meet the standards specified for the chosen test, he "may be further evaluated as determined by the railroad's medical examiner." 49 C.F.R. § Pt. 242, App. D(4). Such further medical evaluation can include "another approved scientific screening test," "[o]phthalmologic referral, field testing, or other practical color testing . . . depending on the experience of the examinee." *Id.* An examinee has no right to endless tests in unchanged circumstances but "must have at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely perform as a conductor." *Id.*

From the list of accepted tests, UP chose to administer the Ishihara (14-plate) test ("Ishihara test"). In 1999, UP supplemented the Ishihara test with a color vision field test ("CVFT") that required an examinee to identify ten wayside signal configurations in a preset order.

DeGeer has longstanding color-vision deficiency yet worked for UP with that condition for several

years without incident. In 2014 or 2015, DeGeer failed the Ishihara test but passed the CVFT and continued to work.

In 2016, UP changed its standard field test in response to criticism it received in an accident report (Filing No. 36-1) from the National Transportation Safety Board ("NTSB"). On June 24, 2012, two UP trains collided near Goodwell, Oklahoma, killing three workers and causing millions of dollars in damages. As part of its investigation of the accident, the NTSB noted one of the engineers involved in the accident had multiple vision problems, including having failed an Ishihara test and suffering from "severe protanopia, also known as red-blindness." (Footnote omitted.) Further noting the engineer had passed the CVFT, the NTSB concluded UP "routinely relie[d] on a color vision field test of unknown validity, reliability, and comparability for medical certification of employees in safety-sensitive positions." The NTSB also concluded the CVFT did "not evaluate a person's ability to accurately perceive signals under common but less than ideal situations, such as during adverse weather, after dark, or under glaring sun."

Based on its conclusion that the CVFT failed "to ensure that UP employees have adequate color perception to perform in safety-sensitive positions," the NTSB recommended UP replace the CVFT "with a test that has established and acceptable levels of validity, reliability, and comparability to ensure that certified employees in safety-sensitive positions have sufficient color discrimination to perform safely." The NTSB further recommended that UP take adequate safety measures while it developed a new test and retest those who had failed a primary color vision test when the new test was implemented. The NTSB also

suggested that the Federal Railroad Administration ("FRA") should provide more guidance on field testing for safety-sensitive positions.

In March 2015, the FRA issued a report entitled "Railroad Signal Color and Orientation: Effects of Color Blindness and Criteria for Color Vision Field Tests" (Filing No. 36-2). The "report affirm[ed] that normal color vision is necessary for certain railroad employees, even if the signal system is completely redundant with regard to signal color and signal orientation." It also noted "employees with defective color vision have a much higher relative error risk than employees with normal color vision when viewing redundant signals (relative risk of an error is nearly 8,000,000 times higher for individuals with defective color vision)."

Later that year, the FRA issued interim guidance "to clarify provisions in its locomotive engineer and conductor qualification and certification regulations" with regard to vision standards and field testing. *See Best Practices for Designing Vision Field Tests for Locomotive Engineers or* Conductors*,* 80 FR 73122-01. The FRA reiterated its "longstanding view . . . that there are some people who, despite not meeting the vision threshold in 49 CFR 240.121(c) and 242.117(h), have sufficient residual visual capacity to safely perform as a locomotive engineer or conductor." *Id.* at 73123. Noting the best practices were drafted broadly "to allow each railroad to develop field testing procedures" that fit its circumstances, the FRA encouraged "each railroad to consider adopting all best practices."

In 2016, UP implemented a new field test described as the Light Cannon Test ("LCT"). DeGeer questions the LCT's validity, reliability, and

comparability in assessing whether an employee who failed an initial color-vision test can safely work as a conductor. UP defends its use of the LCT. In support, it points to a 2017 decision from the Locomotive Engineer Review Board that stated the LCT "is an adequate field test as contemplated by 49 C.F.R. Part 240, Appendix F, paragraph (4)" under the circumstances in that case (Filing No. 36-3).

In 2017, DeGeer again failed the Ishihara test. As an alternative, UP administered the LCT, which DeGeer also failed. UP imposed work restrictions on DeGeer that prohibited him from performing work that required accurate identification of colored railroad wayside signals. DeGeer could have appealed the denial of his recertification to the Operating Crew Review Board within 120 days of the decision but did not. *See* 49 C.F.R. § 242.501.

On July 7, 2017, UP listed DeGeer on a spreadsheet it provided in supplemental discovery in a putative class-action case filed by former UP employee Quinton Harris and others (the *"Harris* plaintiffs") in 2016. *See Harris v. Union Pacific,* 8:16CV381 (D. Neb). The *Harris* plaintiffs alleged UP's fitness-for-duty policies and practices led to widespread violations of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq*. They originally defined the ADA class they sought to represent under Federal Rule of Civil Procedure 23 as follows:

> Individuals who were removed from service over their objection, and/or suffered another adverse employment action, during their employment with Union Pacific for reasons related to a Fitness-for-Duty evaluation at any time from 300 days before the earliest

> date that a named Plaintiff filed an administrative charge of discrimination to the resolution of this action.

UP moved to dismiss and/or strike (Filing No. 87 in 8:16CV381) the *Harris* plaintiffs' ADA class-action allegations, arguing they were unable to meet the class-certification requirements of Rule 23 because "the assessment of whether each putative class member is a 'qualified individual with a disability' under the ADA and the assessment of damages for each class member involve inquiries too individualized and divergent to warrant class certification." The Court denied the motion (Filing No. 111 in 8:16CV381), concluding dismissal "would be premature at this stage of the litigation."

On August 17, 2018, the *Harris* plaintiffs moved (Filing No. 240 in 8:16CV381) to certify a narrower class consisting of "All individuals who have been or will be subject to a fitness-for-duty examination as a result of a reportable health event at any time from September 18, 2014 until the final resolution of this action." They sought certification of their disparate-treatment claim as alleged in Count I. *See* 42 U.S.C. § 12112(a). In support of their motion, the *Harris* plaintiffs included a declaration from DeGeer (Filing No. 17-3) briefly describing the disability discrimination he allegedly faced at UP due to the recent change to the LCT. UP opposed class certification (Filing No. 259 in 8:16CV381), again arguing the *Harris* plaintiffs failed "to show that the putative class members have a disparate treatment claim that can be adjudicated on a classwide basis" under Rule 23.

Despite UP's objections, the Court granted the motion and certified the *Harris* class. UP appealed,

decrying the "sprawling, diverse class of more than 7,000 current and former Union Pacific employees." *See Harris v. Union Pac. R.R.,* 953 F.3d 1030, 1039 (8th Cir. 2020). On March 24, 2020, the Eighth Circuit reversed the class-certification decision. *See Harris v. Union Pac. R.R.,* 953 F.3d 1030, 1039 (8th Cir. 2020). On remand, UP successfully moved to sever the *Harris* plaintiffs' claims (Filing Nos. 331 and 340 in 8:16CV381).

The parties in this case agree (for our purposes) that DeGeer was in the original *Harris* class, and that his claims were tolled at least until the *Harris* plaintiffs moved to certify a narrower class. *See Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 354 (1983) discussing tolling in class-action cases under *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 553 (1974)). But they disagree as to whether DeGeer ever fit within the certified *Harris* class and what effect the motion to certify had on DeGeer's claims.

DeGeer notes the *Harris* plaintiffs repeatedly referred to the spreadsheets from UP containing DeGeer's name as "class lists," discussed the LCT in their briefing, and relied on DeGeer's declaration in support of class certification. DeGeer also contends UP's discovery responses in *Harris* suggested DeGeer had a fitness-for-duty evaluation related to a reportable health event.

UP counters that it never described its spreadsheets as "class lists" and consistently maintained that providing the spreadsheets and other "over-inclusive" responses were not admissions that anyone listed was necessarily part of any asserted class (Filing Nos. 17-7, 17-9, 17-11, and 17-13). According to UP, DeGeer was not in the certified

*Harris* class because he specifically declared he was subject to a fitness-for-duty examination "as part of [his] routine FRA recertification," not because of a reportable health event under UP's medical rules.

After decertification, DeGeer filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on May 1, 2020. That date is 623 days after the Harris plaintiffs moved for class certification and 38 days after the Eighth Circuit reversed the *Harris* class certification. The EEOC issued DeGeer a Notice of Right to Sue on January 5, 2023.

DeGeer filed suit the next day, alleging multiple ADA violations and seeking a declaration that he was a member of the certified *Harris* class. As DeGeer sees it, his claims were tolled until the Eighth Circuit decertified the class. UP denies he was a member of the certified class and argues tolling stopped on his claims when the *Harris* plaintiffs narrowed the class in a way that excluded him and abandoned any other claims. UP contends DeGeer's claims are barred by the statute of limitations.

On February 20, 2023, DeGeer moved for partial summary judgment on UP's statute-of-limitations defense, arguing "DeGeer's claims were tolled until the Eighth Circuit" decertified the *Harris* class, which gave DeGeer 300 days to file his charge of discrimination. He alternatively argues that equity favors tolling his claims if he was not in the certified *Harris* class and that UP should be equitably and judicially estopped from asserting a statute-of-limitations defense.

UP not only opposes DeGeer's motion for partial summary judgment (Filing No. 32) but has also filed a motion for judgment on the pleadings. According to

UP, DeGeer's claims are both untimely and fail on the merits. DeGeer responds that a merits challenge is premature, and the Court should decide the statute-of-limitation "issue on the basis of the briefs, evidence, and other documents already submitted in support of and in opposition to [his] Motion for Partial Summary Judgment under Rule 56, as the Rules require."[1]

Both motions are now fully briefed and ready for decision.

## II. DISCUSSION

### A. Standards of Review

In deciding a motion for judgment on the pleadings under Rule 12(c), the Court applies the same standard as for a motion to dismiss under Rule 12(b)(6). *See Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009). The Court accepts as true all facts pleaded by the non-moving party and grants all reasonable inferences in their favor. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. Cargill, Inc.*, 61 F.4th 615, 619 (8th Cir. 2023) (noting courts can consider matters that are incorporated into the pleadings by reference or are integral to a claim); *cf. Dittmer Properties, L.P. v. FDIC*, 708 F.3d 1011, 1021 (8th Cir. 2013) (explaining "courts are not strictly limited to the four corners of complaints" in adjudicating Rule 12(b)

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[1] In their apparent zeal to present the issues in this case in a favorable light and to have the Court decide them post haste, both parties have taken some unusual steps that have led to some procedural anomalies (such as unauthorized fact statements and improper and argumentative responses) and some broad objections in response. Despite that and the relatively complex procedural history in this case, the Court has tried to stay on track and has neither relied on any improper extraneous materials nor weighed the evidence in resolving each of the pending motions under the proper standard of review.

motions and listing several categories of information that can be considered without converting a Rule 12 motion into one for summary judgment). "Judgment on the pleadings is appropriate only when there is no dispute as to any material facts and the moving party is entitled to judgment as a matter of law." *Nat'l Union*, 61 F.4th at 619 (quoting *Ashley County v. Pfizer, Inc*., 552 F.3d 659, 665 (8th Cir. 2009)).

On a partial motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party. *See Walker-Swinton v. Philander Smith Coll.,* 62 F.4th 435, 438 (8th Cir. 2023). Summary judgment is required on an issue "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

**B. Disability Discrimination**

The ADA makes it unlawful for employers like UP to "discriminate against a qualified individual on the basis of disability in regard to" the "terms, conditions, and privileges of [their] employment." 42 U.S.C. § 12112(a)). To that end, it prohibits

> using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

*Id. §* 12112(b)(6).

Under the ADA, the term "disability" means "(A) a physical or mental impairment that substantially

limits one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id. §* 12102(1)). "[A] person is regarded as disabled if her employer mistakenly believes that she has a physical impairment that substantially limits one or more major life activities or mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." *Canning v. Creighton Univ.,* 995 F.3d 603, 614-15 (8th Cir. 2021). DeGeer alleges all three.

The ADA requires an employee alleging disability discrimination "to file a complaint with the EEOC before filing a suit in federal court." *Voss v. Hous. Auth. of the City of Magnolia,* 917 F.3d 618, 623 (8th Cir. 2019); *see also* 42 U.S.C. §§ 2000e-5(e)(1), 12117(a). In general, the employee must file the discrimination charge "within 300 days of the alleged discriminatory act." *Tusing v. Des Moines Indep. Cmty. Sch. Dist.,* 639 F.3d 507, 520 (8th Cir. 2011).

As noted above, DeGeer acknowledges he submitted his claims to the EEOC more than 300 hundred days after the alleged discriminatory acts in this case. He argues the limitation period for his claims was tolled under the principles set forth in *American Pipe,* under which "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Crown, Cork & Seal,* 462 U.S. at 353-54 (quoting *American Pipe,* 414 U.S. at 554). For DeGeer, the math is simple. His discrimination claims were tolled until the *Harris* class was decertified. And his EEOC discrimination charge—filed 38 days later—was timely.

UP agrees DeGeer's claims were tolled to a point but argues tolling ceased when the *Harris* plaintiffs moved to certify a narrower class on August 17, 2018,—a class that did not include DeGeer—and abandoned any claims beyond their disparate-treatment claim in Count I. UP urges the Court to follow *Sawtell v. E.I. du Pont de Nemours & Co.,* 22 F.3d 248, 254 (10th Cir. 1994), and *Smith v. Pennington,* 352 F.3d 884, 894 (4th Cir. 2003), which UP posits establish the principle "that, when plaintiffs move for class certification utilizing a narrower definition than that asserted in their complaint, only the newly proposed class continues to be subject to *American Pipe* tolling." According to UP, DeGeer had until June 13, 2019, to file his EEOC complaint. Because he didn't file until May 2020, "his disparate treatment and disparate impact causes of action are time-barred and should be dismissed." UP has had considerable success with that line of argument following decertification of the *Harris* class. *See, e.g., Zaragoza v. Union Pac. R.R.,* No. EP-21-CV-287-KC, 2023 WL 2062471, at *3-4, 7 (W.D. Tex. Feb. 17, 2023) (noting "[a]t least three other districts" had decided UP employees "who failed their color-vision testing during the FRA recertification process" were not included in the *Harris* certified class); *Donahue v. Union Pac. R.R.,* No. 21-CV-00448-MMC, 2022 WL 4292963, at *4-5 (N.D. Cal. Sept. 16, 2022), *motion for relief from judgment denied,* No. 21-CV-00448-MMC, 2022 WL 17478590 (N.D. Cal. Nov. 10, 2022); *Blankinship v. Union Pac. R.R.,* No. CV-21-00072-TUC-RM, 2022 WL 4079425, at *4-5 (D. Ariz. Sept. 6, 2022), *motion for relief from judgment denied,* No. CV-21-00072-TUC-RM, 2022 WL 16715467 (D. Ariz. Nov. 4, 2022).

DeGeer admits as much in his complaint but

contends that UP has achieved that success by misrepresenting the record and making false claims and that those courts failed to properly apply the rule from *Sawtell/Smith* and the "bedrock principles" of *American Pipe*. He also notes (1) most of those adverse decisions have been appealed, (2) the Eighth Circuit has not yet weighed in on the *Sawtell/Smith* approach, and (3) another district court denied UP's argument for dismissal of an unlawful-screening claim in a case involving a conductor who presented a risk of seizures after brain surgery because the district court concluded the original *Harris* complaint gave UP notice of his claim. *See Brasier v. Union Pac. R.R.,* No. CV2100065TUCJGZMSA, 2023 WL 2754007, at *13 (D. Ariz. Mar. 31, 2023) (finding the employee's allegations "fell squarely within" the certified class definition). To DeGeer, he was in the *Harris* certified class, and his claims are timely.

This case presents a close call, particularly in light of the lengthy history in this case and its present posture. But after careful review, the Court finds UP has the stronger position on the tolling issues before the Court. Assuming DeGeer is a qualified individual and that his color-vision deficiency is a cognizable disability under the ADA in these circumstances, which is far from clear on this limited record, the Court concludes he was not a member of the certified *Harris* class.[2] Try as he might, DeGeer cannot escape his sworn declaration that his fitness for duty evaluation was part of his routine FRA recertification and not the "result of a reportable health event." *See Zaragoza,* 2023 WL 2062471, at *4-6. His post hoc attempts to recharacterize the impetus for his failed

[2] The Court does not reach UP's alternative arguments for dismissal.

vision tests and subsequent work restrictions are unpersuasive. Under a reasonable and practical application of *American Pipe* tolling principles, the limitation period for DeGeer's ADA claims stopped tolling no later than February 5, 2019, when he and his claims were no longer part of the *Harris* class action. DeGeer's EEOC discrimination charge—admittedly filed more than 300 days later—was untimely, and his ADA claims are time barred.

The Court also rejects DeGeer's brief argument that UP "is equitably estopped because of its representations during discovery, and judicially estopped because of its representations in the appeal, from asserting a statute of limitations defense." The Court is satisfied that UP has been sufficiently clear under the circumstances about its position on the scope of the certified class and that UP did not concede that anyone listed on the spreadsheets it provided was part of any putative class. *See Owen v. Union Pac. R.R.,* No. 8:19CV462, 2020 WL 6684504, at *5 n.2 (D. Neb. Nov. 12, 2020) (rejecting a judicial estoppel argument in similar circumstances).

Based on the foregoing,

IT IS ORDERED:

1. Plaintiff Todd DeGeer's Motion for Partial Summary Judgment (Filing No. 14) is denied.
2. Defendant Union Pacific Railroad Co.'s Motion for Judgment on the Pleadings (Filing No. 33) is granted in part and denied in part. DeGeer's disability-discrimination claims are dismissed with prejudice as untimely. The motion is denied in all other respects.
3. A separate judgment will issue.

Dated this 21st day of June 2023.

BY THE COURT:

Robert F. Rossiter, Jr.

Chief United States District Judge