No. 24-630

IN THE
Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

NICHOLAS DEFRIES, JAMES BLANKINSHIP, JUSTIN DONAHUE, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

Scott P. Moore
BAIRD HOLM LLP
1700 Farnam Street
Suite 1500
Omaha, NE 68102
(402) 636-8268
spmoore@bairdholm.com

Thomas H. Dupree, Jr.
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondents do not dispute that the Ninth Circuit significantly expanded the scope of *American Pipe* tolling. Whereas this Court held that only "asserted members of the class" are entitled to equitable tolling, *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), the Ninth Circuit held that persons who were *not* members of the class are *also* entitled to tolling—so long as they have not been "unambiguously excluded" from the class, App. 25a.

Respondents make three arguments in opposition to certiorari. None has merit and this Court should grant review.

First, respondents claim there is no circuit split. But they cannot credibly deny that the Ninth Circuit's "unambiguously excluded" standard differs from the standard the Fourth and Tenth Circuits apply for *American Pipe* tolling. Both of those courts simply ask, consistent with *American Pipe* itself, whether the bystander plaintiff was a member of the class. *See Smith v. Pennington*, 352 F.3d 884 (4th Cir. 2003); *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248 (10th Cir. 1994). The Ninth Circuit's newly-minted standard for equitable tolling has now been adopted in the Fifth and Eighth Circuits. *See Zaragoza v. Union Pac. R.R. Co.*, 112 F.4th 313 (5th Cir. 2024); *DeGeer v. Union Pac. R.R. Co.*, 113 F.4th 1035 (8th Cir. 2024). And many courts, including both the courts in this case and *Zaragoza*, have expressly recognized the confusion and disagreement in the lower courts over the correct legal standard.

Second, respondents contend that the Ninth Circuit's expansion of *American Pipe* was "necessary"

because, in the words of that court, "anything short of unambiguous [exclusion] would undermine the balance contemplated by [the *American Pipe*] Court." Opp. 23 (quoting App. 13a). But the Ninth Circuit's rule *upsets* that balance and directly conflicts with *American Pipe* and the way this Court has always interpreted the rule for equitable tolling. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983) (stating the "holding" of *American Pipe* is that "[t]he filing of a class action tolls the statute of limitations *as to all asserted members of the class*") (emphasis added and quotation marks omitted). Respondents say the Ninth Circuit's rule will avoid causing a rush to the courthouse by bystander plaintiffs. Opp. 15. But this Court has repeatedly rejected that exact rationale in cases where, as here, the lower court expanded the availability of *American Pipe* tolling beyond anything this Court has ever allowed.

Third, respondents argue that this case is a poor vehicle because the Ninth Circuit supposedly found that respondents were class members. But that is demonstrably incorrect: The Ninth Circuit did *not* find that DeFries or the other respondents were class members—indeed, the court had no need to decide that question because the test it adopted was not whether they were class members but whether they were "unambiguously excluded" from the class. Although respondents cite evidence that they say proves they were class members, that is a question that can be decided on remand once this Court has clarified the correct legal standard for equitable tolling.

Three times in the last decade this Court has granted review to rein in lower courts' unwarranted

expansions of equitable tolling. *See Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250 (2016); *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497 (2017); *China Agritech, Inc. v. Resh*, 584 U.S. 732 (2018). This case—where the Ninth Circuit's policy-driven expansion of *American Pipe* directly conflicts with the rule in other circuits as well as with *American Pipe* itself—is equally deserving of review.

I. The Circuits Are Split Over The Question Presented.

Respondents deny a circuit split. But there can be no serious dispute that the Ninth, Eighth, and Fifth Circuits have adopted a legal standard for tolling (whether bystander plaintiffs are "unambiguously excluded" from the class) that is at odds with the legal standard applied in the Fourth and Tenth Circuits (whether bystander plaintiffs are members of the class). *See Smith v. Pennington*, 352 F.3d 884 (4th Cir. 2003); *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248 (10th Cir. 1994). While the Ninth Circuit's rule turns on the existence of ambiguity—*see* App. 7a ("a relevant ambiguity in the scope of the class should allow bystander plaintiffs to rely on *American Pipe* tolling")—the Fourth and Tenth Circuits both apply a rule of decision that has nothing to do with ambiguity but simply turns on class membership.

In claiming that the circuits are all applying the same standard, respondents distort the rule followed in the Fourth and Tenth Circuits. In *Pennington*, the Fourth Circuit held that to be entitled to *American Pipe* tolling, bystander plaintiffs "must have been members of the class [the named plaintiff] sought to have certified." 352 F.3d at 893. Here is how respondents describe *Pennington*: "[T]he court held

that would-be plaintiffs who fell outside of an unambiguous class definition were not entitled to *American Pipe* tolling." Opp. 18-19 (quotation marks omitted). But that is *not* what the Fourth Circuit held. Here is what the court actually said:

> We therefore hold that because appellants were not members of the class [the named plaintiff] sought to have certified … , their … claims were not entitled to tolling for that period and, consequently, were time-barred.

352 F.3d at 896. The Fourth Circuit squarely held that plaintiff was not entitled to tolling because she was not a class member. It did not adopt a rule of "unambiguous exclusion" as the test for tolling.

Respondents similarly mischaracterize the Tenth Circuit's rule. Here is how respondents describe *Sawtell*:

> The Tenth Circuit thus held that, because the narrowness of the revised class definition was clear, the plaintiff was unambiguously excluded from the class and therefore not entitled to *American Pipe* tolling once the definition had been narrowed.

Opp. 18 (brackets and quotation marks omitted). But here too, that is *not* what the Tenth Circuit held. The decision does not refer to "unambiguous exclusion," let alone suggest that is the standard for equitable tolling. Rather, the court held, consistent with *American Pipe* and *Crown, Cork & Seal*, that the plaintiff was not entitled to tolling because she was not a member of the class:

> Ms. Sawtell has presented no evidence supporting the inference she was a putative member of the class. … The Supreme Court held "'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). Ms. Sawtell would not have been a party to the Minnesota suits had any of them continued as a class action. The statute of limitations should not be tolled.

22 F.3d at 253-54 (some citations omitted).

Because they cannot credibly deny that the circuits have adopted different standards for *American Pipe* tolling, respondents reframe the circuit split and then attack their false construct. Respondents say: "As [Union Pacific] sees it, the Fourth and Tenth Circuits, unlike the courts below, would deny tolling to a plaintiff where there is genuine ambiguity as to class membership." Opp. 17. But that is not what the Fourth and Tenth Circuits held, and that is not what Union Pacific is arguing. Rather, Union Pacific's point is that when there is genuine ambiguity as to class membership, the Fourth and Tenth Circuits would resolve the ambiguity and simply determine whether the bystander plaintiffs were or were not members of the class and thus entitled to tolling. The Ninth, Eighth, and Fifth Circuits, in contrast, halt their analysis once they find ambiguity and allow tolling—on the basis

that the ambiguity means the bystander plaintiffs could not have been "clearly excluded" from the class.

The difference in these two approaches has substantial consequences in class actions in which a class definition has been modified in an ambiguous way or in which it is unclear whether the modified class definition encompasses a particular bystander plaintiff. The approach followed in the Ninth, Eighth, and Fifth Circuits means that potentially thousands of bystander plaintiffs in a large class action would still be able to bring individual claims long after the statute of limitations would otherwise have expired—whereas these same bystander plaintiffs would not be allowed to pursue their claims in the Fourth or Tenth Circuits.

The *Zaragoza* court recognized that this is "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 (5th Cir. 2024), and even the Ninth Circuit in this case acknowledged that "[t]he problem has split many district courts," App. 9a. Respondent cites the Newberg treatise for the point that the circuits are aligned in cases where the bystander plaintiff is "clearly excluded" from the class. Opp. 3, 18. But respondents do not suggest that *this* is such a case, so the alignment of the circuits on a question not presented here does not defeat the existence of a circuit split on the question that *is* presented.

II. The Ninth Circuit's Decision Improperly Expands And Conflicts With *American Pipe*.

Respondents begin their statement with the following sentence:

> Nearly 50 years ago, this Court laid down a straightforward rule in *American Pipe*: "[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class."

Opp. 5 (quoting 414 U.S. at 554). Respondents then spend the rest of their brief attempting to justify the Ninth Circuit's transformation of this "straightforward rule" into something far more expansive and uncertain.

Until the Ninth Circuit's decision, *American Pipe* tolling had always been limited to a discrete group: class members. The Ninth Circuit's decision crosses a significant line by allowing tolling for people who are *not* class members—but who claim that while they may have been excluded from the class, they were not "unambiguously" excluded and thus may bring claims that would otherwise have expired years before. Just as in *China Agritech*, where this Court granted review and reversed the Ninth Circuit's expansion of *American Pipe* by noting that none of the Court's prior decisions "so much as hints that tolling extends to otherwise time-barred class claims," 584 U.S. at 740, here too none of the Court's prior decisions so much as hints that tolling extends to persons who were not class members.

Respondents do not deny that the Ninth Circuit extended *American Pipe* well beyond its holding.

According to the Ninth Circuit, "adopt[ing] the 'unambiguous exclusion' rule" was "necessary," Opp. 15, because "anything short of unambiguous narrowing would undermine the balance contemplated by the Supreme Court," App. 13a. The Ninth Circuit's assertion that a radical expansion of *American Pipe* was necessary to maintain the "balance" this Court contemplated is not just presumptuous, but wrong.

On one side of the balance is the defendant's interest in repose and not having to defend against stale claims. Here, the harm to that interest is magnified because it is unclear who might fall within a group of persons who are not class members but have not been "unambiguously excluded" (whatever that may mean) from the class. And that group will very likely be large: In *Harris*, the class was narrowed by thousands of individuals, all of whom could argue that while they were excluded from the class, they were not *unambiguously* excluded.

On the other side of the balance is the interest in not requiring bystander plaintiffs to rush to the courthouse. But this Court has repeatedly rejected that exact concern as a basis for expanding *American Pipe* tolling. *See ANZ Sec.*, 582 U.S. at 513; *China Agritech,* 584 U.S. at 746. Here too, there is no reason to believe that adhering to *American Pipe*'s tolling standard will cause a massive rush to courthouses. And respondents err in claiming that bystander plaintiffs—who must demonstrate "diligence" to obtain equitable relief, *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)—cannot be expected to "parse" "class definition[s]" and "monitor class proceedings." Opp. 25. Bystander plaintiffs already do these things.

They already must parse class definitions to determine if they fall within a class definition and may be entitled to a recovery if the class action succeeds—or if they may be entitled to tolling if the class is not certified. And they already must monitor class proceedings because class decertification would trigger the statute of limitations on their individual claims. Indeed, even under respondents' preferred rule, class members must still monitor proceedings and parse any changes to class definitions to determine if the class definition has been narrowed in a way that unambiguously excludes them.

In short, maintaining the balance established in *American Pipe* requires maintaining the rule established in *American Pipe*: Persons who were members of the class are entitled to equitable tolling; persons who were not members of the class are not.

III. There Are No Vehicle Problems.

Respondents say that this case is a poor vehicle because the Ninth Circuit supposedly determined that respondent DeFries was actually a member of the class. Opp. 21. Respondents are wrong for many reasons.[1]

First, respondents' arguments as to whether they are actually members of the class is beside the point in determining whether "the question presented is … actually presented." Opp. 21. The question presented

[1] Respondents' vehicle argument is not just misplaced, but it at most could only apply to the petitions in *DeFries* and *Zaragoza*; respondents concede that it does not apply to *DeGeer* because "[t]he Eighth Circuit did not reach the issue of whether Mr. DeGeer … was actually a class member." Opp. 22 n.6.

concerns the legal standard for when a bystander plaintiff is entitled to *American Pipe* tolling. If respondents are correct that they were class members, that simply means they will prevail on remand when the court of appeals applies the correct legal standard for tolling. Whether respondents will in fact be able to prove on remand that they were class members has no bearing on whether the question presented is actually presented. It is.

Second, contrary to respondents' argument, the Ninth Circuit did *not* hold that DeFries (or the other respondents Blankinship and Donahue) were members of the class. Rather, the court said only that while it leaned toward interpreting the class definition in a way that would encompass people who claimed the same disability as DeFries, there was room for debate on this question. *See* App. 7a ("While we believe the better reading of the definition of the certified *Harris* class included color-vision plaintiffs like DeFries, we recognize that there is room for reasonable argument to the contrary."). Indeed, the court had no need to decide whether DeFries was a class member because under its test for equitable tolling, the inquiry does not turn on whether respondent was actually a class member but rather on whether he had been unambiguously excluded from the class.

Third, respondents are wrong to proclaim that "even if this Court were to adopt Union Pacific's preferred rule, the outcome of each case would remain unaffected." Opp. 21. Respondents cannot make this prediction with such confidence when all three district courts independently held that the respondents were *not* members of the class. To be sure, respondents

disagree and cite various reasons why they should be deemed members of the class—*e.g.*, some of them (but not DeFries) were on a list of class members, and some of them submitted declarations that Union Pacific referred to in its appeal to the Eighth Circuit. *See* Opp. 21. Respondents also suggest that Union Pacific may be estopped even from taking the position that they were not class members. *See* Opp. 4. But all of these arguments—which did not persuade any of the district courts below—go to the merits of respondents' tolling claim and will be addressed by the court of appeals on remand once this Court confirms the correct legal standard. None of them pose an impediment to granting review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Scott P. Moore
BAIRD HOLM LLP
1700 Farnam Street
Suite 1500
Omaha, NE 68102
(402) 636-8268
spmoore@bairdholm.com

Thomas H. Dupree, Jr.
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioner

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