No.

IN THE

Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

ROBERT ANTHONY ZARAGOZA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth 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 Fifth Circuit held, consistent with the Eighth 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 excluded" from the class. App. 16a (emphasis omitted).

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 (W.D. Tex.):

Zaragoza v. Union Pac. R.R. Co.,

No. 21-cv-287 (Feb. 17, 2023)

United States Court of Appeals (5th Cir.):

Zaragoza v. Union Pac. R.R. Co.,

No. 23-50194 (Aug. 12, 2024)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–18a) is reported at 112 F.4th 313 (5th Cir. 2024). The order of the district court on Union Pacific's motion for summary judgment (App. 19a–36a) is reported at 657 F. Supp. 3d 905 (W.D. Tex. 2024).

JURISDICTION

The court of appeals entered its judgments on August 12, 2024. App. 1a–18a. On October 23, 2024, Justice Alito granted Union Pacific's application for an extension of time within which to file a petition for certiorari, extending the deadline to December 10, 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 Fifth Circuit's latest 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. 27a–28a.

The Fifth Circuit reversed the district court. Adopting the Ninth Circuit's rule from *DeFries v. Union Pacific Railroad Co.*, 104 F.4th 1091, 1097 (9th Cir. 2024), it held that the question was *not* whether respondent had been a member of the decertified class. Rather, the Fifth 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 excluded*'" from the class. App. 16a (quoting *DeFries*, 104 F.4th at 1105).

The Fifth Circuit's rule 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 the district court described as "a difficult issue that has divided courts for decades." App. 47a. Likewise, the Ninth Circuit, in deciding the same issue, acknowledged that "[t]he 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 Fifth 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."

The question presented here is important and recurring. The Fifth Circuit is the third court of

appeals to reach this expansive "unambiguously excludes" standard for *American Pipe* tolling in cases arising from the decertified *Harris* class action. *See DeFries*; *DeGeer v. Union Pac. R.R. Co.*, 113 F.4th 1035 (8th Cir. 2024).

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 Fifth 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.

The Court should resolve this important and recurring issue. To that end, and for reasons set forth below, Union Pacific respectfully requests that the Court grant or at least hold this petition pending resolution of the certiorari petitions in *DeGeer v. Union Pac. R.R. Co.*, No. 24610, and *DeFries v. Union Pac. R.R.*, No. 24-630.

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 Fifth Circuit reversed the district court, holding that respondent was entitled to *American Pipe* tolling because he had not been "unambiguously excluded" from the *Harris* class. App. 16a (emphasis omitted).

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 Pac. 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. *DeFries*, 104 F.4th at 1101. 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. *Id.* If employees 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. *Id.* 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. *Id.*; App. 3a.

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. 2a. 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. 3a. Respondent sued Union Pacific under the ADA, alleging that his removal from safety-sensitive positions was an unlawful adverse employment action. App. 5a.

Union Pacific moved for summary judgment on the grounds that respondent's claim was untimely.

App. 5a–6a. 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. 7a.

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. App. 7a–8a, 25a.

The district court granted Union Pacific summary judgment on the basis that respondent had not been a member of the *Harris* class. App. 26a–28a. The court reached that conclusion on the grounds that respondent's adverse employment action did not arise from a "reportable health event." App. 27a. His failure to pass the light cannon test arose from longstanding color-vision deficiencies and was not itself a "reportable health event." App. 27a–28a.

C. The Fifth Circuit's Decision

The Fifth Circuit reversed the district court. The court adopted the principle first set forth by the Ninth Circuit in *DeFries*, stating that "'[e]nding *American Pipe* tolling with anything short of unambiguous narrowing would undermine the balance contemplated by the Supreme Court'" because it would "'encourage[e] putative or certified class members to rush to intervene as individuals or to file individual actions.'" App. 15a (quoting *DeFries*, 104 F.4th at 1099). Thus, while the court of appeals was

inclined to view respondent's claims as being included in the narrowed class definition, it ultimately settled on what it treated as being the decisive consideration: that respondent's claim was not "'*unambiguously excluded*'" from the *Harris* certified class." App. 16a (quoting *DeFries*, 104 F.4th at 1105).

In considering the parties' arguments as to whether respondent's failure to pass the light cannon test was a reportable health event, the court of appeals acknowledged that Union Pacific's position—that respondent's past failures indicated that his color-vision deficiencies were longstanding, and that he therefore did not experience a "reportable health event," as required for class membership—"may prove true." App. 14a. But the court of appeals nevertheless decided that whatever the empirical reality as to whether respondent met the criteria for the narrowed class definition, "[h]is claims were also included within the *Harris* district court's class definition" in virtue of not being definitively *excluded*. App. 16a.

Although the Fifth 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. 7a (quoting 414 U.S. at 554), the court of appeals took a more expansive approach. Citing to "the balance contemplated by the Supreme Court" in deciding *American Pipe*, and the need for class actions to "reduc[e] repetitious and unnecessary filings," the court of appeals followed the Ninth Circuit's standard of extending *American Pipe* tolling to anyone not "unambiguous[ly]" excluded from the relevant class definition. App. 15a (internal quotation marks and citation omitted).

On the Fifth Circuit's standard, 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."

As applied to respondent's claims, the Fifth Circuit was thus able to reserve issues relevant to determining that respondent was not a class member until a later stage of the litigation, noting that "[a]t least" respondent was not unambiguously excluded from the class. App. 16a. The court therefore held that because respondent was not "unambiguously excluded" from the class definition, he was entitled to *American Pipe* tolling—regardless of whether he was *actually* a member of the certified class. App. 16a.

REASONS FOR GRANTING THE PETITION

This case raises an important and recurring question related to the application of *American Pipe* tolling. Union Pacific requests that the Court grant or at least hold this petition pending its resolution of the certiorari petitions in *DeGeer v. Union Pac. R.R. Co.*, No. 24-610, and *DeFries v. Union Pac. R.R.*, No. 24-630.

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 excluded" from the class definition, they are entitled to *American Pipe* tolling. In the Ninth Circuit, "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 Eighth Circuit adopted the Ninth Circuit's "unambiguously excludes" rule. *See DeGeer v. Union Pac. R.R. Co.*, 113 F.4th 1035 (8th Cir. 2024). All three cases arose in the same factual posture—they were both 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 *DeGeer*, as here, the circuit court adopted the Ninth Circuit's rule and reversed the district court.

In *DeGeer*, the Eighth Circuit also held that the plaintiff's individual claims were timely "because the revised definition [in the *Harris* certified class] did not unambiguously exclude DeGeer." 113 F.4th at 1037. As did the Fifth Circuit, the Eighth Circuit quoted *DeFries* "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." *Id*. at 1039 (quotation marks omitted). Thus, the court concluded, "[b]ecause 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." *Id*. at 1041. The court expressly stated that it "need not decide" whether DeGeer actually *was* a member of the narrowed class to hold that he was entitled to *American Pipe* tolling. *Id*. at 1040 (explaining that "whether the class definition included DeGeer is a 'close call,'" but "[b]ecause we think both positions have merit, we need not decide who has the right of the argument").

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 Fifth Circuit's Decision Improperly Extends, And Conflicts With, *American Pipe*.

Review is warranted for an additional and independent reason: The Fifth Circuit's decision (together with those of two other circuits) conflicts with *American Pipe* and its progeny by allowing

persons who are not class members to claim equitable tolling. The Fifth 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 Fifth 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 be 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 Fifth Circuit was wrong to extend *American Pipe* to persons who are not class members so long as they have not been "unambiguously excluded" from the class. The Fifth 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 "'anything short of unambiguous [exclusion]'" should be resolved in favor of continuing to extend *American Pipe* tolling. App. 15a (quoting *DeFries*, 104 F.4th at 1099.

The Fifth 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 Fifth 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 Fifth Circuit should have exercised caution before expanding the size of the group entitled to claim it.

The Fifth Circuit's rationale—that not allowing *American Pipe* tolling would prompt a flood of protective lawsuits, *see* App. 15a (a no-tolling rule "'would encourage[e] putative or certified class members to rush to intervene as individuals or to file individual actions'" (quoting *DeFries*, 104 F.4th at 1099))—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. The Court Should Grant Or At Least Hold This Petition For *DeFries* and *DeGeer*

This case raises "a difficult issue that has divided courts for decades." App. 47a. 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 Fifth 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 decision 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. While the court of appeals stated that "Zaragoza was consistently a member of the *Harris* class for tolling

purposes," App. 10a, it reached that conclusion in language that was ultimately dicta. In addressing Union Pacific's arguments to the contrary, the court acknowledged that Union Pacific's position "may prove to be true." App. 14a. The Fifth Circuit thus agreed that the factual record it was reviewing simply "suggested" that Zaragoza was a member of the narrowed class. It did not need to reach a more definitive view than that because the standard it settled on—following *DeFries*—was that Zaragoza was entitled to tolling so long as the narrowed class definition did not "unambiguously exclude[]" him. App. 16a (emphasis omitted). In the event this court were to grant certiorari in *DeFries* and *DeGeer* and rule in Union Pacific's favor, the Fifth Circuit should have the opportunity to reconsider this case under the appropriate legal standard.

Thus, at a minimum, this Court should hold this case pending resolution of the certiorari petitions in *DeGeer v. Union Pac. R.R. Co.*, No. 24-610, and *DeFries v. Union Pac. R.R. Co.*, No. 24-630. The question presented in those cases, as in this one, asks the Court to determine whether *American Pipe* tolling extends to individual litigants who were not class members simply because the class definition at issue does not "unambiguously exclude[]" them. *DeFries*, 104 F.4th at 1099. If the Court grants certiorari in *DeFries* and *DeGeer*, it will clarify the application of *American Pipe* tolling in a way that would bear directly upon resolution of this case. Thus, Union Pacific respectfully requests that the Court grant or at least hold the case pending *DeFries* and *DeGeer*.

CONCLUSION

The petition for a writ of certiorari should be granted or at least held.

Respectfully submitted,

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December 10, 2024

APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 23-50194

ROBERT ANTHONY ZARAGOZA,

Plaintiff—Appellant,

versus

UNION PACIFIC RAILROAD COMPANY,
a Delaware Corporation,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:21-CV-287
Filed August 12, 2024

Before WILLETT, WILSON, and RAMIREZ,
Circuit Judges.

CORY T. WILSON, *Circuit Judge*:

American Pipe tolling equitably freezes the statute of limitations for all putative or certified class members during the pendency of a class action. *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974). Plaintiff-Appellant Robert Zaragoza contends

American Pipe salvages his otherwise untimely discrimination claims against Defendant-Appellee Union Pacific Railroad Company. Zaragoza asserts that his claims were tolled from 2016 to 2020 because he was a putative and certified class member in a separate class action against Union Pacific during that period. The district court rejected Zaragoza's argument and dismissed his claims at summary judgment, as untimely. However, because the operative complaint and certification order in the class action both contained class definitions that included Zaragoza, his claims were tolled, and the district court erred by concluding otherwise. We reverse the district court's dismissal of Zaragoza's disability discrimination claims and remand for further proceedings.

I.

A.

Zaragoza worked as a brakeman and train conductor for Union Pacific from November 2006 to April 2016. Zaragoza's employment was terminated in July 2015 after he tested positive for cocaine; he was reinstated in September 2015. Throughout Zaragoza's tenure, including after his reinstatement, Union Pacific administered a fitness-for-duty program to comply with various internal and federal safety regulations. Union Pacific's Medical Rules establish the fitness-for-duty program, which applies to all employees and post-offer applicants. That program includes tests designed to assess employees' color vision acuity.

One such test, the Ishihara test, requires subjects to identify numbers and figures made up of multi-

colored dots across fourteen plates. Zaragoza passed an Ishihara test when he began his employment in 2006, though he failed them in 2010, 2013, and 2016. When Zaragoza failed those Ishihara tests, he was given additional field tests to assess his color vision. In 2010 and 2013, Union Pacific's alternate field test required the subject to identify ten wayside signal configurations in a preset order. Zaragoza passed the field test in those years, and he was allowed to continue working as a conductor.

However, in 2014, Union Pacific amended its fitness-for-duty program. Some of the changes included suspension from duty without pay, further testing requirements, and, in some cases, termination from the company if an employee disclosed or Union Pacific discovered certain medical or physical conditions. Applicable here, the updated policy also required those who failed the Ishihara test to complete a new field test using a light cannon. The light cannon was placed a quarter mile away from the examinee, and the examinee was shown twenty separate signal lights for three seconds each, which the examinee then had to identify. When Zaragoza failed the Ishihara test on April 8, 2016, he was removed from service. After he also failed the light cannon test on April 19, 2016, he was denied recertification as a train conductor on May 3, 2016.

Over the next few months, Zaragoza contested Union Pacific's determination that he had a color vision deficiency. Zaragoza submitted various reports from doctors attesting to his adequate color vision, though he wore special contact lenses to pass at least one of his doctor's tests. There is a question whether Zaragoza wore similar corrective lenses for the Union

Pacific tests that he passed in 2006, 2010, and 2013. Regardless, Zaragoza was never reinstated as a conductor.

B.

As we will discuss *infra*, according to Zaragoza, the proceedings in *Harris v. Union Pacific Railroad Co.* tolled his eventual claims regarding the updated fitness-for-duty policy against Union Pacific. 329 F.R.D. 616 (D. Neb. 2019), *rev'd*, 953 F.3d 1030 (8th Cir. 2020). In February 2016—two months before Zaragoza failed Union Pacific's color vision tests in April 2016—Quinton Harris and five other named plaintiffs filed their first amended complaint in *Harris*, bringing disability discrimination claims against Union Pacific on behalf of current and former Union Pacific employees. This operative complaint defined the relevant class as:

> 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.

Union Pacific does not contest that Zaragoza fell within this class definition.

Over two years later, in August 2018, the *Harris* plaintiffs moved for class certification under a slightly revised class definition:

> 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.

The *Harris* plaintiffs supported their motion with forty-four declarations from prospective class members, including three declarations from workers who—like Zaragoza—had suspected or admitted color vision deficiencies. The *Harris* plaintiffs also supported their motion with a prospective class list—originally produced by Union Pacific—of 7,723 current or former Union Pacific employees, including Zaragoza.

In February 2019, the district court granted class certification using the exact language from the *Harris* plaintiffs' proposed revised class definition, while referencing the forty-four declarations as being from "class members." *Harris*, 329 F.R.D. at 624 & n.3. The district court also adopted the *Harris* plaintiffs' proposed class list and ordered that notices be sent to the listed individuals, which still included Zaragoza. *Id.* at 627–28.

Union Pacific appealed the class certification to the Eighth Circuit, asserting that the class presented too many individualized questions. In its arguments, Union Pacific referenced vision issues among class members and cited two of the declarations submitted by Union Pacific workers with alleged color vision deficiencies as examples of why the certified class was too unwieldy. The Eighth Circuit ultimately agreed with Union Pacific and decertified the class in an opinion issued on March 24, 2020. *Harris v. Union*

Pac. R.R. Co., 953 F.3d 1030, 1039 (8th Cir. 2020).

C.

Zaragoza filed his disability discrimination charge with the EEOC on March 8, 2020, just before the Eighth Circuit decertified the *Harris* class. After the EEOC completed its review of his case in October 2021, Zaragoza filed this action in November 2021, bringing claims for disparate treatment, disparate impact, and failure to accommodate. The district court dismissed Zaragoza's failure to accommodate claim at the motion to dismiss stage as time-barred, and that decision has not been appealed. The district court then dismissed Zaragoza's remaining claims via summary judgment as untimely, finding that the *Harris* district court's February 2019 certification order ended tolling for his claims and that the applicable 300-day statute of limitations expired before March 2020. The district court did not reach the merits of the parties' other arguments. Zaragoza appealed the district court's summary judgment in favor of Union Pacific.

II.

We review "summary judgment[s] *de novo*, applying the same standard as the district court." *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010) (emphasis added). Summary judgment is warranted "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). A material fact is one that "might affect the outcome of the suit under the governing law," and a genuine dispute exists if "the evidence is such that a reasonable jury could return a

verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "When considering a motion for summary judgment, the court views all facts and evidence in the light most favorable to the non-moving party." *Howell v. Town of Ball*, 827 F.3d 515, 522 (5th Cir. 2016) (quoting *Moss*, 610 F.3d at 922). The equitable underpinnings of *American Pipe* tolling do not affect our standard of review. *See Odle v. Wal-Mart Stores, Inc.*, 747 F.3d 315, 319 (5th Cir. 2014); *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 516 (5th Cir. 2008).

III.

Zaragoza contends that his discrimination claims against Union Pacific should benefit from *American Pipe* tolling and are timely. We agree. (A) Surveying the applicable law, a putative class is defined by the plaintiffs' operative complaint, at least until that class is certified, when the district court's certification order supplants the definition as pled. Applying these principles, (B) we determine that Zaragoza's claims were tolled by his inclusion in both the putative and certified class definitions in the *Harris* class action. Thus disposing of the main issue on appeal, (C) we decline to engage Union Pacific's contention that the district court's dismissal of Zaragoza's claims should be upheld on alternate grounds.

A.

Under *American Pipe*, "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." 414 U.S. at 554. In *Crown, Cork & Seal Co. v. Parker*, the Supreme Court

reiterated *American Pipe*'s holding, articulating that "[o]nce 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." 462 U.S. 345, 354 (1983). This rule guards against "protective motions to intervene" or individual suits from every involved party wary that their rights may be in jeopardy. *American Pipe*, 414 U.S. at 553. It necessarily sweeps broadly to cover even "asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings." *Id.* at 552.

A class is initially defined by the plaintiffs via their complaint. *Cf. id.* at 554 (emphasizing that "asserted members of the class" benefit from tolling). Plaintiffs have the prerogative to define the scope of claims that they bring and notify defendants "not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Id.* at 555. As class actions progress, plaintiffs may expand, narrow, or otherwise refine their action by filing amended pleadings. These amended class definitions supersede prior ones for tolling purposes. *See Odle*, 747 F.3d at 316–19 (analyzing a plaintiff's entitlement to tolling based in part on a prior class action's amended pleading).

However, plaintiffs' prerogative to redefine a class does not extend beyond amending their pleadings. From there, the onus falls to the district court to "define, redefine, subclass, and decertify as

appropriate in response to the progression of the case from assertion to facts." *Salazar-Calderon v. Presidio Valley Farmers Ass'n (Calderon I)*, 765 F.2d 1334, 1350 (5th Cir. 1985) (quoting *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir.), *cert. denied*, 464 U.S. 1009 (1983)). Accordingly, class definitions are not affected by intervening motions in a class action—even motions to certify a class. This practice of placing the class definition exclusively in the hands of the district judge after the pleading stage promotes "efficiency and economy of litigation," which is one of the chief goals of the equitable tolling doctrine. *American Pipe*, 414 U.S. at 553. Relevant here:

> When a class is certified . . . the district court has necessarily determined that all of the Rule 23 factors are met. From that point forward, unless the district court later decertifies the class for failure to satisfy the Rule 23 factors, members of the certified class may continue to rely on the class representative to protect their interests throughout the entire prosecution of the suit, including appeal.

Taylor, 554 F.3d at 520–21. Thus, when a district court certifies a class, that certified class becomes the pertinent class definition.[1] Further, the class definition persists through appeal.[2] A subsequent

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[1] Here, the pertinent class was actually a subclass within the *Harris* class action. But as Federal Rule of Civil Procedure 23(c)(5) explains, "a class may be divided into subclasses that are each treated as a class." Fed. R. Civ. P. 23(c)(5).

[2] By comparison, when a district court denies class certification, tolling immediately ends for putative class members. *Hall v.*

decertification of that class, either by the district court or the appellate court, ends tolling going forward but does not affect the earlier class certification for tolling purposes.

To summarize: Prior to class certification, the pertinent class definition in a class action is drawn from the plaintiffs' operative complaint(s). That class definition is not disturbed by precertification motions practice during the life cycle of a class action. And at the point a district court certifies a class, the certified class definition supersedes any previously articulated ones. That certified class persists—even through appeal—until the class is decertified or the case is otherwise resolved.

B.

Today's task is to determine whether Zaragoza was part of the *Harris* class, and if so, how long he was included in the class. Relevantly, Zaragoza's claims accrued in April 2016 when he was removed from service, approximately two months after the operative complaint in *Harris* had been filed.[3] And Zaragoza filed his own charge of discrimination in March 2020

Variable Annuity Life Ins. Co., 727 F.3d 372, 375 (5th Cir. 2013). Even if the district court is reversed on appeal and subsequently certifies the class it previously denied, the statute of limitations for the claimants would have resumed and possibly expired during the intervening period. *Calderon v. Presidio Valley Farmers Ass'n (Calderon II)*, 863 F.2d 384, 390 (5th Cir. 1989); *see also Odle*, 747 F.3d at 321 (discussing *Calderon I* and *Calderon II*).

[3] Arguably, Zaragoza's claims accrued in May 2016 when he was denied recertification, but the parties do not address this detail, and it does not bear on our analysis.

shortly before the Eighth Circuit decertified the *Harris* class. This timeline narrows our inquiry to two key points. First, looking to the then-operative pleading, was Zaragoza included in the class definition of the February 2016 complaint in *Harris*? Second, was Zaragoza included in the *Harris* district court's certified class? We answer both questions affirmatively, such that Zaragoza was consistently a member of the *Harris* class for tolling purposes.

1.

The operative complaint in *Harris* was an amended complaint filed on February 19, 2016. That complaint defined the relevant proposed class 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.

The district court in this case did not address whether this class definition encompassed Zaragoza, and Union Pacific does not argue that Zaragoza was excluded from it.

The lack of attention on this point underscores its relative simplicity. After all, Zaragoza failed a color vision test administered through Union Pacific's fitness-for-duty program that resulted in the loss of his job over his objection. These circumstances easily place Zaragoza within the class definition alleged in

the operative February 2016 *Harris* complaint. In practical terms, this means the limitations period on Zaragoza's claims against Union Pacific was tolled from the moment his claims accrued—as the operative complaint in *Harris* was already on file at that time.[4] The tolling effect of this class definition persisted at least until the district court certified the *Harris* class and adopted a revised class definition.

2.

The *Harris* class was certified under a revised definition on February 5, 2019. Zaragoza initiated his EEOC proceedings on March 8, 2020. Accordingly, allowing that Zaragoza was a member of *Harris*'s February 2016 proposed class definition, he must also have been a member of the revised definition; otherwise, the statute of limitations for his claims would have started to run on February 5, 2019, and expired before March 8, 2020. *See, e.g.*, *Ramirez v. City of San Antonio*, 312 F.3d 178, 181 (5th Cir. 2002) (describing the 300-day statute of limitations for discrimination claims under the Americans with Disabilities Act).

As highlighted above, the *Harris* district court certified a class of plaintiffs including "[a]ll 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

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[4] *American Pipe* explains that tolling a statute of limitations simply pauses the clock; it does not reset it. 414 U.S. at 560–61. In other words, if certain claims are tolled eleven days before the statute of limitations expires—as was the case in *American Pipe*—then the plaintiff only has eleven days to act once tolling ceases. *Id.* at 561.

18, 2014 until the final resolution of [*Harris*]." 329 F.R.D. at 628. In its order, the court referenced "declarations from 44 *class members* who have experienced the discrimination alleged herein." *Id.* at 624 (emphasis added). Those included several employees with admitted or alleged color vision deficiencies. The *Harris* district court also directed that notice of the class claims be sent to a "class list," which included Zaragoza, though there is no indication those notices were distributed. *Id.* at 627–28.

Union Pacific consistently objected that this class definition was overbroad, and the Eighth Circuit ultimately agreed on appeal. *Harris*, 953 F.3d at 1039. But Union Pacific's position and its success on appeal only support the conclusion that the class as certified was expansive for tolling purposes. The upshot seems plain: The *Harris* district court's certified class included Zaragoza as a member, and the court as well as those parties so treated him. That alone could, and perhaps should, end the inquiry. *See Calderon I*, 765 F.2d at 1350 (recognizing "that these complex cases cannot be run from the tower of the appellate court given its distinct institutional role and that it has before it printed words rather than people" (quoting *Richardson*, 709 F.2d at 1019)). However, in this action, Union Pacific nonetheless contends that Zaragoza falls outside of the certified class based on the class definition.[5]

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[5] Union Pacific may well be estopped from discarding its previous representations of the *Harris* class's overbreadth to argue here that same class was narrow enough to have excluded

But even considering the matter afresh, we conclude that Zaragoza fell within *Harris*'s certified class definition, as revised from the one proposed in February 2016. To review, he failed an Ishihara color vision test in 2016. This result indicated that an aspect of Zaragoza's health, namely his color vision, had deteriorated since his last recertification and warranted further review. Under Union Pacific's fitness-for-duty program, this "reportable health event" triggered a follow up test using the light cannon. When Zaragoza also failed the light cannon test, he suffered an adverse employment action—the loss of his job. Therefore, Zaragoza is an "individual[] who ha[d] been . . . subject to a fitness-for-duty examination as a result of a reportable health event" during the class period encompassed by the certified class definition. *Harris*, 329 F.R.D. at 628.

Of course, this conclusion hinges on whether Zaragoza's failed Ishihara test in 2016 was a "reportable health event"—a conclusion that Union Pacific vigorously contests. A "reportable health event," as used in the certified class definition, is a term of art drawn from Union Pacific's Medical Rules, meaning "a new diagnosis, recent event, or change in a prior stable condition." A "[s]ignificant vision change in one or both eyes affecting . . . color vision" is specifically enumerated in Appendix B of the Medical Rules as a "reportable health event." Noting Zaragoza's repeated failures of the Ishihara test in 2010, 2013, and 2016, his passing the prior alternate test in 2010 and 2013, and his failing the new light cannon test in 2016, Union Pacific argues that "[t]hese

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Zaragoza. Zaragoza does not press this possibility, so we do not explore it either.

results suggest a change in testing methods, rather than a change in Zaragoza's vision." This may prove to be true, but it is far from undisputed. Indeed, the alleged impropriety of the light cannon test and adequacy of Zaragoza's color vision are core aspects of his disability discrimination claims against Union Pacific. And "construing all facts and reasonable inferences in favor of the nonmoving party," *Lillie v. Off. of Fin. Institutions State of Louisiana*, 997 F.3d 577, 582 (5th Cir. 2021), as we must at this stage, Zaragoza'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."

As a final point, the district court in this case cited two out-of-circuit cases, *Smith v. Pennington*, 352 F.3d 884 (4th Cir. 2003), and *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248 (10th Cir. 1994), for the proposition that "once a court adopts a class definition that unambiguously excludes certain plaintiffs, their individual limitations periods begin to run." The Ninth Circuit recently reached the same conclusion in a companion case to the one before us. *DeFries v. Union Pac. R.R. Co.*, 104 F.4th 1091 (9th Cir. 2024). We agree, but because we think the class definition does not unambiguously exclude Zaragoza, this principle supports Zaragoza's position, not Union Pacific's.[6]

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[6] These precedents also confirm our consultation of Union Pacific's Medical Rules for the definition of "reportable health event." Two of these circuits explicitly considered materials outside of the complaints and motions for certification in delineating class membership. *See DeFries*, 104 F.4th at 1107–

"Ending *American Pipe* tolling with anything short of unambiguous narrowing would undermine the balance contemplated by the Supreme Court" by "encourag[ing] putative or certified class members to rush to intervene as individuals or to file individual actions." *DeFries*, 104 F.4th at 1099. Indeed, "the class action mechanism would not succeed in its goal of reducing repetitious and unnecessary filings if members of a putative class were required to file individual suits to prevent their claims from expiring." *Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 (5th Cir. 2013). 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. *DeFries*, 104 F.4th at 1105 (emphasis added). Thus, Zaragoza's claims were tolled during the pendency of the *Harris* certified class.

* * *

Zaragoza was included in the class definition of the operative February 2016 complaint in *Harris*. His claims were also included within the *Harris* district court's certified class definition. Thus, Zaragoza's claims were tolled from the moment they accrued until the Eighth Circuit issued its mandate decertifying the *Harris* class, which effectively ended tolling for all putative *Harris* class members. *Harris*, 953 F.3d at 1039; *see also Hall*, 727 F.3d at 374 ("[T]he

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09; *Pennington*, 352 F.3d at 894–95. The other did not have record evidence outside of the complaint and motion for certification before it but was open to considering such evidence. *See Sawtell*, 22 F.3d at 253 & n.11.

statute of repose ceased to be tolled when the class certification order was vacated."). But by the time the Eighth Circuit rendered its decision, Zaragoza had initiated EEOC proceedings for his claims. Therefore, those claims were timely asserted.

C.

Union Pacific raises several alternate grounds upon which we might affirm the district court's grant of summary judgment. Particularly, Union Pacific contends that Zaragoza's claims fail under the *McDonnell Douglas* framework and that Zaragoza was not a qualified employee due to his purported color vision deficiency. Zaragoza responds to these arguments in his reply, but the district court did not reach any of them in its decision.

"[A] court of appeals sits as a court of review, not of first view." *Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017) (citation omitted). This cautionary refrain has especial force when a potential alternate ground for affirmance involves a "fact intensive" summary judgment record, as it does here. *See, e.g.*, *Flores v. FS Blinds, L.L.C.*, 73 F.4th 356, 366 (5th Cir. 2023) (quoting *Hathcock v. Acme Truck Lines, Inc.*, 262 F.3d 522, 527 (5th Cir. 2001)) (reversing and remanding instead of reaching a fact intensive summary judgment argument in the first instance). In such a case, "[g]iven that the district court did not reach [the issues], the normal course would be to remand for the district court to do so." *Montano*, 867 F.3d at 546. Accordingly, we decline Union Pacific's invitation to affirm the district court on heretofore unexplored grounds; that court may consider the parties' remaining summary judgment arguments on

remand. We forecast no opinion on the relative merits of the parties' assertions on these issues.

IV.

Zaragoza was included in the *Harris* class, as pled in February 2016 and as initially certified in February 2019. Therefore, his disability discrimination claims were tolled from the time they accrued until he asserted them, as an individual claimant, with the EEOC in March 2020. The district court's summary judgment dismissing Zaragoza's claims as untimely was therefore in error. We decline to consider the parties' remaining summary judgment arguments in the first instance.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ROBERT ANTHONY ZARAGOZA,	§	
Plaintiff,	§	
v.	§	**CAUSE NO. EP-21-CV-287-KC**
UNION PACIFIC RAILROAD COMPANY,	§	
Defendant.	§	

ORDER

On this day, the Court considered Defendant Union Pacific Railroad Company's ("Union Pacific") Motion for Summary Judgment ("Motion"), ECF No. 43. For the reasons set forth below, the Motion is **GRANTED**.

I. BACKGROUND

The following facts are undisputed unless otherwise noted.

A. Plaintiff's Employment Dispute

This case involves the implementation of Union Pacific's internal Fitness-for-Duty ("FFD") policies, and how those policies affected employees—like Zaragoza—with color-vision deficiency. *See* Compl. ¶¶ 1–5, ECF No. 1. The Federal Railroad

Administration ("FRA") requires companies like Union Pacific to periodically assess the color vision of certain employees. *See* 49 C.F.R. § 242.117(b), (h)(3); Def.'s Proposed Undisputed Facts ("PUF") ¶¶ 10–11, ECF No. 43-1. FRA regulations provide for two levels of color-vision testing. *See* 49 C.F.R. pt. 242 app. D. First, a railroad employee must take one of several "acceptable" tests listed by the FRA to "determin[e] whether [the employee] has the ability to recognize and distinguish among the colors used as signals in the railroad industry." *Id.* app. D(2). Then, if the employee fails the initial test, they "may be further evaluated as determined by the railroad's medical examiner," using, among other things, "field testing." *Id.* app. D(4).

Zaragoza has color-vision deficiency, which he disclosed to Union Pacific during his preemployment medical evaluation. PUF ¶ 49. During his FRA examinations in 2010 and 2013, Zaragoza took and failed the Ishihara Test, Union Pacific's initial color-vision test. *See* PUF ¶¶ 52, 56; Pl.'s Separate Statement Facts ("PUF Resp.") ¶ 46, ECF No. 49-1. But in both examinations, Zaragoza took and passed Union Pacific's follow-up test. PUF ¶¶ 55–56. Zaragoza was cleared for work after both examinations because he passed these follow-ups. PUF Resp. ¶ 46.

Then, in 2016, Union Pacific began using a new follow-up examination: the "Light Cannon" test. PUF ¶ 35. In the same year, Zaragoza underwent vision screening for FRA recertification. PUF ¶ 57. As he did in 2010 and 2013, Zaragoza failed the initial Ishihara test. PUF ¶ 57. But during this examination, he also failed the new Light Cannon

follow-up. PUF ¶ 58. Based on these test results, Union Pacific suspended Zaragoza's employment. PUF ¶ 66; PUF Resp. ¶ 53.

Zaragoza alleges that despite his test results, he remains "capable of performing the essential functions of his job." Compl. ¶ 35. He further alleges that Union Pacific's Light Cannon test "does not simulate real world conditions" and has resulted in many employees "who have never had a problem performing the essential functions of their jobs [being] removed from work." *Id.* ¶¶ 22–23. Based on these allegations, Zaragoza raises disparate treatment and disparate impact claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, challenging Union Pacific's use of the Light Cannon test.[1] Compl. ¶¶ 41–58.

B. The *Harris* Class Action

Zaragoza's claims put him within the scope of an early iteration of the putative class in *Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030, 1033 (8th Cir. 2020). *See* PUF ¶ 69. In the suit's operative pleading, the plaintiffs described the proposed class as:

> 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

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[1] Zaragoza also brought a failure to accommodate claim. Compl. ¶¶ 59–64. The Court dismissed this claim on timeliness grounds. *Zaragoza v. Union Pac. R.R. Co.*, --- F. Supp. 3d ----, 2022 WL 2145556, at *6 (W.D. Tex. June 10, 2022).

> administrative charge of discrimination to the resolution of this action.

Def. Ex. II ("*Harris* Compl."), at ¶ 116, ECF No. 43-5.

However, in their motion for class certification, the *Harris* plaintiffs defined the proposed class more narrowly, as "[a]ll 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." Def. Ex. JJ ("*Harris* Class Mot."), at 1, ECF No. 43-5 (emphasis added); *see also* Def. Ex. KK ("*Harris* Class Br."), at 22, ECF No. 43-5. A "reportable health event," in turn, was defined by Union Pacific's medical rules as "any new diagnosis, recent event[], and/or change in" certain conditions, including color vision. PUF ¶¶ 74–76 (alteration in original); *Harris* Compl. 43. The *Harris* plaintiffs acknowledged that the class definition in their certification motion had "been narrowed from the Amended Complaint." *Harris* Class Br. 22 n.5.

On February 5, 2019, the district court certified the proposed class. *Harris v. Union Pac. R.R. Co.*, 329 F.R.D. 616, 628 (D. Neb. 2019), *rev'd*, 953 F.3d at 1039. The district court used the narrowed class definition provided in the plaintiffs' certification motion. *Compare id.*, *with Harris* Class Mot. 1. The court also ordered that notice be sent to "7,723 current and former [Union Pacific] employees" included on a potential class list created by Union Pacific. *Harris*, 329 F.R.D. at 627. That list included Zaragoza. PUF Resp. ¶ 71.

On March 8, 2020, Zaragoza filed a charge of discrimination with the Equal Employment

Opportunity Commission ("EEOC"). PUF ¶ 79. A few weeks later, the Eighth Circuit decertified the class approved by the district court in *Harris*. PUF ¶ 80; *Harris*, 953 F.3d at 1039. On November 23, 2021, Zaragoza filed this lawsuit. *See* Compl.

II. DISCUSSION

A. Standard

A court must enter summary judgment "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); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Weaver v. CCA Indus., Inc.*, 529 F.3d 335, 339 (5th Cir. 2008). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quoting *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (per curiam)). A dispute about a material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 189 (5th Cir. 1996).

"[The] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323; *Wallace v. Tex. Tech. Univ.*, 80 F.3d 1042, 1046–47 (5th Cir. 1996). To show the existence of a genuine dispute, the nonmoving party must support its position with

citations to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials[,]" or show "that the materials cited [by the movant] do not establish the absence . . . of a genuine dispute, or that [the moving party] cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c).

The court resolves factual controversies in favor of the nonmoving party, but factual controversies require more than "conclusory allegations," "unsubstantiated assertions," or "a 'scintilla' of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Further, when reviewing the evidence, the court must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh evidence. *Man Roland, Inc. v. Kreitz Motor Express, Inc.*, 438 F.3d 476, 478–79 (5th Cir. 2006) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). Thus, the ultimate inquiry in a summary judgment motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52.

B. Analysis

To file suit under the ADA, a plaintiff must first exhaust his administrative remedies by filing a charge of discrimination with the EEOC. *Melgar v. T.B. Butler Publ'g Co.*, 931 F.3d 375, 378–79 (5th Cir. 2019) (per curiam) (collecting cases). A plaintiff must

file this charge "within three hundred days after the alleged unlawful employment practice occurred."[2] *Id.* at 379 (citing 42 U.S.C. § 2000e-5(e)(1)). But this limitations period "is subject to equitable doctrines such as tolling or estoppel." *Id.* at 380 (first citing *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 880 (5th Cir. 2003); and then citing 29 C.F.R. § 1614.604(c)).

As relevant here, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). The Supreme Court reasoned that the class action would "notif[y] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment," thereby satisfying the same purposes as a statute of limitations. *See id.* at 554–55.

But a class action only provides a defendant with notice of the substantive claims and identity of potential plaintiffs "if the plaintiff's desired class was, in fact, certified." *Smith v. Pennington*, 352 F.3d 884, 893 (4th Cir. 2003) (citing *Davis v. Bethlehem Steel Corp.*, 769 F.2d 210, 212 (4th Cir. 1985)); *see also Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 376 (5th Cir. 2013) ("[A denial of class certification] serves as notice to the once-putative class members that they

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[2] The *Harris* plaintiffs and Union Pacific agreed to extend this deadline by sixty days after the Eighth Circuit decertified the *Harris* class. *See* Pl. Ex. 57, at 2, ECF No. 49-15. But this agreement was limited to the members of the class certified by the district court in *Harris*. *See id.* at 1. Because Zaragoza was not a member of the certified class—as the Court concludes below—this agreement did not affect his rights.

are 'no longer parties to the suit and . . . [a]re obliged to file individual suits or intervene.'" (quoting *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 520 (5th Cir. 2008)) (second alteration in *Hall*)). Therefore, once a court adopts a class definition that unambiguously excludes certain plaintiffs, their individual limitations periods begin to run. *See Smith*, 352 F.3d at 884; *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248, 253–54 (10th Cir. 1994).[3]

The timeliness of this action thus turns on whether the class definition certified by the *Harris* district court included Zaragoza. If so, then his limitations period was tolled until the Eighth Circuit decertified the class, and his EEOC charge was timely. But if the class definition excluded Zaragoza, then his limitations period began running when the district court certified the narrowed class, and his EEOC charge was untimely.[4]

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[3] Both *Smith* and *Sawtell* suggest that an excluded plaintiff's limitations period begins to run once the class representatives move to certify a class that excludes them, rather than when the district court certifies the narrowed class. *See Smith*, 352 F.3d at 894; *Sawtell*, 22 F.3d at 253. This Court previously noted that the date of class certification seems to be the better date from which to calculate the limitations period. *See Zaragoza*, 2022 WL 2145556, at *3 n.2. But here, the analysis remains the same regardless of the date used. Zaragoza filed his EEOC charge on March 8, 2020, more than 300 days after the district court certified the *Harris* class on February 5, 2019, let alone when the *Harris* plaintiffs moved to certify the narrowed class on August 17, 2018.

[4] The Court previously considered the issue of timeliness and class-action tolling when it addressed Union Pacific's motion to dismiss. *See Zaragoza*, 2022 WL 2145556, at *2–5. There, the Court held that the similarity between Zaragoza's disparate

The *Harris* class only included plaintiffs who were subject to an FFD examination "as a result of a reportable health event," 329 F.R.D. at 628, and a reportable health event requires some "new diagnosis, recent event[], and/or change" in a health condition, PUF ¶¶ 74–76 (alteration in original). Zaragoza, however, did not experience any change in his vision that prompted a new FFD examination. Rather, he underwent an FFD examination in 2016 as part of his periodic FRA recertification process. *See* PUF Resp. ¶ 47. It follows that Zaragoza's FFD examination was not conducted "as a result of a reportable health event," excluding him from the plain terms of the certified class in *Harris*. *See* 329 F.R.D. at 628.

Zaragoza raises three arguments for why his claims are not time barred. First, he argues that the class certification motion in *Harris* did not actually narrow the proposed class. Resp. Def.'s Mot. Summ. J. ("Resp.") 9–11 & n.5, ECF No. 49. Any references to narrowing in the motion, Zaragoza contends, merely referred to claims that the plaintiffs abandoned at that stage. *See id.* at 9 n.5.

Zaragoza's reading is facially implausible. The motion expressly states that "the *class definition* has been narrowed from the Amended Complaint." *Harris*

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treatment and disparate impact claims allowed both to proceed, even though the *Harris* plaintiffs abandoned their disparate impact claim before seeking class certification. *Id.* at *4–5. But the Court did not address the question presented in the current motion: whether Zaragoza remained a member of the *Harris* class after the district court's class certification order. Neither party argues that the Court's previous order settles the issues presented by Union Pacific's summary judgment Motion, or that Union Pacific has waived or forfeited this argument.

Class Br. 22 n.5 (emphasis added). And reading the second, certified *Harris* class definition in the same way as the first, proposed *Harris* class definition would render all the changes between the two superfluous. *Cf. United States v. Palomares*, 52 F.4th 640, 644–45 (5th Cir. 2022) (discussing how "courts prefer interpretations that give independent [ ] effect to every word and clause in a statute") (collecting cases). The plain language of the class certification motion and order limited the class to those who underwent testing "as a result of a reportable health event." *Harris*, 329 F.R.D. at 628; *Harris* Class Mot. 1. Because Zaragoza offers only implausible, unsubstantiated assertions to the contrary, his argument is unavailing. *See Little*, 37 F.3d at 1075.

Second, Zaragoza argues that even if the *Harris* class definition was narrowed at certification, the new definition still included him. *See* Resp. 6–9, 11–14. He argues that Union Pacific employs a broader definition of "reportable health event" in practice, which does not require a change in health status. *See* Resp. 11–14. In support of this argument, Zaragoza cites statements from a Union Pacific employee saying that reportable health events "may be identified during a supervisor-initiated request for FFD evaluation," or "during required regulatory examination of an employee, such as an FRA examination." Pl. Ex. 54, at ¶¶ 18–19, ECF No. 49-14.

But even if these statements suggest a broader definition of the *Harris* class, they still do not suggest a definition that includes Zaragoza. Nothing in the record shows that Zaragoza was referred for an FFD evaluation by a supervisor. Nor is there any evidence that Zaragoza failed his FRA recertification

examination because of a change in his vision. Indeed, Zaragoza's 2016 recertification results essentially resemble his 2010 and 2013 results: he failed the initial Ishihara test, then took Union Pacific's follow-up test. *See* PUF ¶¶ 52–57. The only noticeable difference between Zaragoza's 2016 results and his previous results is that the 2016 examination involved a Light Cannon test (which Zaragoza failed), while the previous examinations involved a different follow-up test (which Zaragoza passed). *See* PUF Resp. ¶¶ 46–48. These results suggest a change in testing methods, rather than a change in Zaragoza's vision.

Moreover, even if there were evidence that Zaragoza's FFD had *uncovered* a reportable health event, it does not follow that the FFD occurred *as a result of* a reportable health event. Therefore, Zaragoza was not a member of the *Harris* class even assuming his failed Light Cannon test qualified as a reportable health event on its own. *See* Resp. 12. Because the certified class only included individuals who were "subject to [an FFD] examination as a result of a reportable health event," *Harris*, 329 F.R.D. at 628, the perception of those reportable health events must have necessarily preceded the FFD examinations. No known or perceived change in Zaragoza's health prompted his FFD examination, so even if the Light Cannon test results revealed a change in Zaragoza's color vision, he would still be excluded from the certified class in *Harris*.[5]

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[5] For similar reasons, Zaragoza cannot show that the *Harris* class included him by showing that it included many "color vision plaintiffs." *See, e.g.*, Resp. 11. The *Harris* class certainly may have included plaintiffs who had their employment suspended

Finally, Zaragoza argues that two references made by the district judge within the class certification order itself show that the narrowed *Harris* class included plaintiffs like Zaragoza. *See* Resp. 6–9. First, the class certification order cited to "declarations from 44 class members who have experienced the discrimination alleged herein." *Harris*, 329 F.R.D. at 624 & n.3. These included nine declarations from plaintiffs with color-vision deficiencies, and at least one declaration from a plaintiff who faced employment restrictions because he failed color-vision tests during FRA recertification. *See* PUF Resp. ¶ 87; Pl. Ex. 49, ECF No. 49-11. Second, notice of the class certification order was sent everyone on a list of "7,723 current and former [Union Pacific] employees" that Union Pacific produced during discovery. *Harris*, 329 F.R.D. at 627. Zaragoza himself was included in this list. PUF Resp. ¶ 71

But these observations do not establish that Zaragoza was a member of the certified class. First, the district court in *Harris* only mentioned the forty-four declarations in one sentence while considering the adequacy of the class representatives and their counsel. *See* 329 F.R.D. at 624. "The adequacy inquiry . . . serves to uncover conflicts of interest between named parties and the class they seek to represent." *In re Deepwater Horizon*, 785 F.3d 1003, 1015 (5th Cir. 2015) (citing *Amchem Prods., Inc. v.*

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based on their color-vision deficiency. But those plaintiffs would still need to show that they were subject to an FFD examination as a result of a reportable health event. Thus, the *Harris* class may have included some color-vision plaintiffs and excluded others. And because Zaragoza's FFD examination did not result from a reportable health event, the *Harris* class excluded him.

Windsor, 521 U.S. 591, 625 (1997)) (alteration in *Deepwater*). In context, then, the *Harris* court appears to use the forty-four declarations merely to show that the class representatives had no conflicts of interest with the putative class members. *See* 329 F.R.D. at 624 ("Plaintiffs have declarations from 44 class members who have experienced the discrimination alleged herein. There is no indication . . . that plaintiffs' interests are divergent or opposed."). Tellingly, the *Harris* court did not discuss the declarations when considering the commonality or typicality of the class representatives' claims. *See generally id.* at 623–24. And in any case, the *Harris* court never expressly considered or stated whether the declarants fell within the certified class. *See generally id.* at 624. To be sure, the *Harris* court's description of the declarants as "class members" appears to imply that the declarants were members of the certified class when read in isolation. *See id.* at 624. But this implication conflicts with the plain terms of the class definition. It would be absurd to read the court's passing reference to the declarations as tacitly expanding the class beyond the explicit definition adopted later in the same order. *Cf. Donahue v. Union Pac. R.R. Co.*, No. 21-cv-448-MMC, 2022 WL 4292963, at *5 (N.D. Cal. Sept. 16, 2022) (finding that one of the forty-four declarants cited in the certification order was not a member of the *Harris* certified class).

Further, while the *Harris* court did rely on Union Pacific's list of 7,723 employees to provide notice to potential class members, Union Pacific consistently denied that the list accurately represented the size and scope of the class. *See* Def. Ex. SS, at 2, ECF No.

54-2 ("[W]e believe the list is over-inclusive even under the class definition we have been operating under.").[6] Nor did the court's use of Union Pacific's list represent a finding that all employees on the list were class members. In fact, the notice sent to the employees on the list stated only that the suit "*may* affect your rights," while repeating the class definition used in the district court's order. *See* Pl. Ex. 97, at 2, *Harris v. Union Pac. R.R. Co.*, No. 8:16-cv-381-JFB-SMB (D. Neb. Aug. 17, 2018), ECF No. 248-35 (emphasis added).[7] Far from evincing that each recipient was included in the certified class, the notice informed plaintiffs like Zaragoza that they were excluded from it.

Finding Zaragoza was not a member of the *Harris* class is consistent with other courts' treatment of similarly situated plaintiffs. At least three district courts have addressed the same question presented

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[6] This fact also defeats Zaragoza's estoppel arguments. *See* Resp. 4–6. Judicial estoppel applies only when "a party's later position [is] 'clearly inconsistent' with its earlier position." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (collecting cases). But Union Pacific never represented—let alone clearly indicated—that plaintiffs like Zaragoza were members of the *Harris* class during its litigation of that case. *See* Def. Ex. SS, at 2; Pl. Ex. 32, at 5–6 & nn.1–3, ECF No. 49-5. Accordingly, Union Pacific is not estopped from denying Zaragoza's membership in the *Harris* class at this stage. *See Owen v. Union Pac. R.R. Co.*, No. 8:19-cv-462, 2020 WL 6684504, at *5 n.2 (D. Neb. Nov. 12, 2020) (rejecting similar estoppel and reliance arguments).

[7] While the parties did not include this document in the summary judgment record, the Court may take judicial notice of the existence of filings in other court proceedings. *See Taylor v. Charter Med. Corp.*, 162 F.3d 827, 829–30 (5th Cir. 1998) (collecting cases).

here: whether a Union Pacific employee who failed their color-vision testing during the FRA recertification process was included in the *Harris* court's certified class. *See DeFries v. Union Pac. R.R. Co.*, No. 3:21-cv-205-SB, slip op. at 9 (D. Or. Nov. 23, 2022), ECF No. 64 (Magistrate's Findings & Recommendation), *adopted*, 2023 WL 1777635 (D. Or. Feb. 6, 2023); *Donahue*, 2022 WL 4292963, at *3–4; *Blankinship v. Union Pac. R.R. Co.*, No. CV-21-72-TUC-RM, 2022 WL 4079425, at *4 (D. Ariz. Sept. 6, 2022). In each case, the court granted summary judgment for Union Pacific, finding that the employees were excluded from the *Harris* class because they did not receive an FFD examination as a result of a reportable health event. *See DeFries*, 2023 WL 1777635, at *3; *Donahue*, 2022 WL 4292963, at *4–5; *Blankinship*, 2022 WL 4079425, at *5–6.

Zaragoza cites two district court opinions that initially appear to adopt a more expansive definition of the *Harris* class. *See* Resp. 15–16 (first citing *Munoz v. Union Pac. R.R. Co.*, No. 2:21-cv-186-SU, 2021 WL 3622074, at *2 (D. Or. Aug. 16, 2021); and then *Campbell v. Union Pac. R.R. Co.*, No. 4:18-cv-522-BLW, 2021 WL 1341037, at *5 (D. Idaho Apr. 9, 2021)). But in each of these cases, a Union Pacific supervisor referred the plaintiff for an FFD examination based on their observations about the plaintiff's condition. *See Munoz v. Union Pac. R.R. Co.*, No. 2:21-cv-186-HL, 2022 WL 4348605, at *2 (D. Or. Aug. 9, 2022); *Campbell*, 2021 WL 1341037, at *5. These observations uncovered a reportable health event—either real or perceived—that gave rise to the FFD examination, putting the *Campbell* and *Munoz* plaintiffs squarely within the *Harris* class. *See*

Campbell, 2021 WL 1341037, at *5; Pl. Ex. 54, at ¶ 18. But as discussed, no supervisor referred Zaragoza for an FFD examination; he merely underwent his regularly scheduled color-vision re-testing because federal regulations required him to do so. *See* PUF Resp. ¶ 47. Thus, the very reasons that put the *Campbell* and *Munoz* plaintiffs within the certified *Harris* class exclude Zaragoza from it. *See DeFries*, 2023 WL 1777635, at *2 (distinguishing *Campbell* and *Munoz* on similar grounds).

In short, Zaragoza was not a member of the certified class in *Harris*. The tolling of Zaragoza's limitations period, therefore, stopped on February 5, 2019, when the district court issued its class certification order. More than three hundred days elapsed between that date and Zaragoza's filing of a discrimination charge with the EEOC, making his filing untimely. As a result, Zaragoza failed to timely exhaust his administrative remedies, and his case cannot proceed.[8] *See Melgar*, 931 F.3d at 378–79.

III. CONCLUSION

For the foregoing reasons, Union Pacific's Motion, ECF No. 43, is **GRANTED**.

SO ORDERED.

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[8] Because it resolves Union Pacific's Motion on timeliness grounds, the Court does not consider Union Pacific's other arguments about preclusion under the Federal Railroad Safety Act or the merits of Zaragoza's ADA claims. *See* Mot. 8–21.

SIGNED this 17th day of February, 2023.

/s/ Kathleen Cardone
KATHLEEN CARDONE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ROBERT ANTHONY ZARAGOZA,	§	
Plaintiff,	§	
v.	§	**CAUSE NO. EP-21-CV-287-KC**
UNION PACIFIC RAILROAD COMPANY,	§	
Defendant.	§	

ORDER

On this day, the Court considered Defendant's Partial Motion to Dismiss ("Motion"). ECF No. 13. For the reasons set forth below, the Motion is **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

A. Plaintiff's Employment Dispute

Plaintiff Robert Anthony Zaragoza brings this disability discrimination suit against his employer, Union Pacific Railroad Company ("Defendant" or "Union Pacific"). Plaintiff worked for Union Pacific as a conductor and brakeman until he failed a color-vision test in April 2016, after which he was placed on "permanent work restrictions prohibiting him from working in any position requiring accurate identification of colored railroad wayside signals."

Compl. ¶¶ 24, 28–30, ECF No. 1. Today, he "remains a Union Pacific employee on an indefinite medical leave of absence." Compl. ¶ 40.

In order to comply with Federal Railroad Administration regulations, Defendant requires its employees who are responsible for train movement to undergo "fitness-for-duty" testing if they have certain known or suspected medical conditions. Compl. ¶¶ 1–2, 17. This testing includes evaluating employees for color-vision deficiency. Compl. ¶¶ 2–3, 19. Plaintiff alleges that he had previously met Defendant's color-vision standards, and only failed his evaluation in 2016 because Defendant implemented discriminatory new testing procedures which did "not simulate real world conditions." Compl. ¶¶ 20–23, 26–35. He states that, at the time he was placed on leave, he "was capable of performing the essential functions of his job, and he remains able to perform them today." Compl. ¶ 35.

B. Procedural History

Plaintiff is not the only litigant to take issue with Defendant's fitness-for-duty evaluations; his case comes to this Court following the decertification of a class action brought by Union Pacific employees, *Harris v. Union Pacific Railroad Co.*, 953 F.3d 1030 (8th Cir. 2020). *See* Compl. ¶¶ 11–13. On February 19, 2016—shortly before Plaintiff was placed on indefinite leave—Quinton Harris and five other named plaintiffs filed an amended complaint in the Western District of Washington, bringing an array of claims on behalf of themselves and two different classes of employees. Compl. ¶ 11; Mot. Ex. C ("*Harris*

Complaint").[1] As is relevant to this case, the *Harris* plaintiffs brought a disparate treatment claim (Count I) and disparate impact claim (Count II) under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112, on behalf of the named plaintiffs and the "ADA Class." *Harris* Compl. ¶¶ 136–153. Plaintiff asserts he was a putative member of this class. Compl. ¶¶ 11–12. However, the *Harris* plaintiffs brought their failure to accommodate claim (Count IV) on behalf of the named plaintiffs only. *Harris* Compl. ¶¶ 159–163. The case was later transferred to the District of Nebraska. Compl. ¶ 11.

On August 17, 2018, the *Harris* plaintiffs sought class certification. *See* Mot. Ex. D ("Motion for Class Certification"). When they did so, they made a decision with important consequences for the instant Motion: they only "s[ought] certification of Count I, ADA disparate treatment, of the Amended Complaint," and did not seek certification of their disparate impact claim. *See* Mot. Ex. E ("Memorandum in Support of Class Certification") 22. The district court granted class certification in February 2019. Compl. ¶ 13. Defendant appealed. *See Harris*, 953 F.3d at 1032. On March 8, 2020, as the appeal was pending, Plaintiff filed a discrimination charge with the Texas Workforce

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[1] "A court may take judicial notice of the record in prior related proceedings, and draw reasonable inferences therefrom." *Wilson v. Huffman (In re Missionary Baptist Found., Inc.)*, 712 F.2d 206, 211 (5th Cir. 1983). Thus, the Court may consider filings from the *Harris* litigation on this motion to dismiss. *See Biliouris v. Patman*, 751 F. App'x 603, 604 (5th Cir. 2019) (per curiam) ("Taking judicial notice of directly relevant public records is proper on review of a Rule 12(b)(6) motion.").

Commission and the Equal Employment Opportunity Commission ("EEOC"). *See* Mot. Ex. A ("EEOC Charge") 1. The Eighth Circuit decertified the class on March 24, 2020. Compl. ¶ 13; *Harris*, 953 F.3d at 1039.

Plaintiff filed suit on November 23, 2021, seeking recovery under the ADA for disparate treatment (Count I), disparate impact (Count II), and failure to accommodate (Count III). Compl. ¶¶ 41–64. Defendant now moves to dismiss Counts II and III as time-barred.

II. DISCUSSION

A. Standard

A motion to dismiss pursuant to Rule 12(b)(6) challenges a complaint on the basis that it fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a Rule 12(b)(6) motion, the court must accept well-pleaded facts as true and view them in a light most favorable to the plaintiff. *Calhoun v. Hargrove*, 312 F.3d 730, 733 (5th Cir. 2002); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). Though a complaint need not contain "detailed" factual allegations, a plaintiff's complaint must allege sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Colony Ins. Co. v. Peachtree Constr., Ltd.*, 647 F.3d 248, 252 (5th Cir. 2011). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"[A] plaintiff's obligation to provide the grounds of

his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation and internal quotation marks omitted); *Colony Ins. Co.*, 647 F.3d at 252. Ultimately, the "[f]actual allegations [in the complaint] must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation omitted). Additionally, claims may be dismissed "on a statute of limitations defense where it is evident from the pleadings that the action is time-barred, and the pleadings fail to raise some basis for tolling." *Taylor v. Bailey Tool & Mfg. Co.*, 744 F.3d 944, 946 (5th Cir. 2014).

B. Disparate Impact

Plaintiff argues that his disparate impact claim is timely because it was tolled until the Eighth Circuit decertified *Harris*. Before filing suit under the ADA, plaintiffs must first exhaust their administrative remedies by filing a charge of discrimination with the EEOC. *Melgar v. T.B. Butler Publ'g Co.*, 931 F.3d 375, 378–79 (5th Cir. 2019) (per curiam). If the charge is filed with a state or local agency, it must be filed "within three hundred days after the alleged unlawful employment practice occurred." *Id.* at 379 (quoting 42 U.S.C. § 2000e-5(e)(1)). However, this three-hundred-day period is treated like a statute of limitations, *see, e.g.*, *McNeill v. Atchison, Topeka & Santa Fe Ry. Co.*, 878 F. Supp. 986, 989 (S.D. Tex. 1995), and may be extended if tolling "freeze[s] the clock," *see Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 (5th Cir. 2013).

Class action tolling traces its origins to *American*

Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), in which the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." *Id.* at 554. This rule arose from the policy consideration that "the class action mechanism would not succeed in its goal of reducing repetitious and unnecessary filings if members of a putative class were required to file individual suits to prevent their claims from expiring if certification of the class is denied." *Hall*, 727 F.3d at 375 (discussing *Am. Pipe*, 414 U.S. at 550–52). The Court found that the considerations that ordinarily motivate statutes of limitations—namely, ensuring "essential fairness" to defendants and preventing plaintiffs from sleeping on their rights—are "satisfied" when a class action "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Am. Pipe*, 414 U.S. at 554–55.

Plaintiff received his permanent work restrictions on May 2, 2016, and filed his EEOC Charge on March 8, 2020. Compl. ¶¶ 15, 30. Thus, his disparate impact claim is time-barred unless it was subject to tolling during the pendency of *Harris*. Plaintiff argues that *Harris* tolled that claim for two separate reasons: first, the *Harris* Complaint contained a disparate impact class claim, and second, the decertified disparate treatment claim "share[d] a common factual and legal nexus" with his disparate impact claim. Pl.'s Resp. Mot. Dismiss ("Response") 3–9, ECF No. 17. The Court considers each argument in turn.

1. The *Harris* Complaint and claim abandonment

Defendant argues that the tolling of Plaintiff's disparate impact claim ceased when the *Harris* plaintiffs moved for class certification of their disparate treatment claim only, because at that point, Plaintiff could no longer rely on the *Harris* litigation to protect his interests regarding his disparate treatment claims. Mot. 13. In response, Plaintiff contends that the *Harris* Complaint sufficed for tolling all stated class claims while that case was pending because that complaint gave Defendant "notice of the subject matter of prospective litigation." Resp. 5 (citing *Am. Pipe*, 414 U.S. at 555).

Two other courts in this District have held in related cases that the *Harris* Complaint's inclusion of a disparate impact class claim was insufficient to toll follow-on plaintiffs' disparate impact claims post-certification. *See Carrillo v. Union Pac. R.R. Co.*, No. EP-21-CV-26-FM, 2021 WL 3023407, at *5–6 (W.D. Tex. July 16, 2021); *Smithson v. Union Pac. R.R. Co.*, No. SA-21-CV-1225-XR, 2022 WL 1506288, at *3 (W.D. Tex. May 11, 2022). The Court agrees. In *Hall*, the Fifth Circuit stated that the statute of limitations resumes running when certification is denied because "the putative class members have no reason to assume that their rights are being protected" by the class action. 727 F.3d at 375–76 (quoting *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 520 (5th Cir. 2008) (cleaned up)). That logic controls here. If named plaintiffs do not seek certification of a class claim, that class claim is abandoned. *See, e.g.*, *Hillis v. Equifax Consumer Servs.*, 237 F.R.D. 491, 494 n.3 (N.D. Ga. 2006); *Carter v. L'Oreal USA, Inc.*, No. 2:16-cv-508-

TFM-B, 2020 WL 1931270, at *19 (S.D. Ala. Apr. 21, 2020). Thus, once it became clear that the *Harris* plaintiffs had abandoned their class claim for disparate impact, Plaintiff could no longer "rely on the named plaintiffs to press [that] claim[]." *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352–53 (1983). The *Harris* plaintiffs moved to certify their disparate treatment claim on August 17, 2018, Mot. Class Cert., and the district court certified the class in February 2019, Compl. ¶ 13.[2] Therefore, the *Harris*

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[2] Although the *Carrillo* and *Smithson* courts concluded that tolling ended when the *Harris* plaintiffs filed their Motion for Class Certification on August 17, 2018, *see Carrillo*, 2021 WL 3023407, at *6; *Smithson*, 2022 WL 1506288, at *3, some courts have indicated that the operative date is the day that the court rules on certification. For instance, in *Choquette v. City of New York*, 839 F. Supp. 2d 692 (S.D.N.Y. 2012), the court rejected the argument "that conduct by class counsel indicating an intention to abandon certain plaintiffs' claims can trigger cessation of *American Pipe* tolling before those claims have actually been discontinued," and concluded that class action tolling "ends when a plaintiff opts out of the class or a class certification decision of the court definitely excludes that plaintiff." *Id.* at 699.

Motions can be amended, and the effect of a motion may not be apparent until the court has ruled on it. As such, it would make sense to set the date of the court's order as the date when "putative class members have no reason to assume" that the class action will protect their rights regarding any claims that are not certified. *See Hall*, 727 F.3d at 376. Such a position would accord with the Supreme Court's statement in *American Pipe* that a class member does not "have any duty to take note of the suit or to exercise any responsibility with respect to it" before "the existence and limits of the class have been established." 414 U.S. at 552; *see also Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring) (observing that *American Pipe* "preserves for class members a range of options *pending a decision on class certification*" (emphasis added)). But it makes no difference in

Complaint no longer protected Plaintiff's disparate impact claim when he filed his EEOC charge on March 8, 2020. *See* Compl. ¶ 15.

Plaintiff's attempt to distinguish *Hall* is unavailing. Plaintiff argues that the Fifth Circuit's logic does not apply to his situation because *Hall* centered on a "decision to vacate class certification," which "had the effect of entirely resolving the class action," whereas here, "the question of class certification remained an open one until the Eighth Circuit ultimately decertified the *Harris* class in 2020." Resp. 8. However, even though the question of certification on the disparate treatment claim remained open until the Eighth Circuit addressed the issue, there was no possibility that the court of appeals would suddenly revive the disparate impact class claim, on which the *Harris* plaintiffs had not even sought certification. The status of the class's disparate impact claim was therefore even more final than a denial of certification or decertification, which ceases tolling despite the fact that the decision "might potentially be reversed on appeal." *See Hall*, 727 at 375–76. The action was, in Plaintiff's words, "entirely resolv[ed]" with respect to putative class members' disparate impact claim when the district court certified the disparate treatment claim only.[3]

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this case, because neither date would make Plaintiff's EEOC Charge timely.

[3] Even if *Hall* did not control, one of the Supreme Court's justifications for the *American Pipe* rule is that the class action "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Am. Pipe*, 414 U.S. at 554–55. When potential class

2. Similarity of claims

Plaintiff argues that, even if claim abandonment generally ceases class action tolling, his disparate impact claim was nevertheless tolled because of its legal and factual similarities with the class's disparate treatment claim. Resp. 3–4. Defendant advocates for a narrower reading of *American Pipe*, contending that tolling only applies when there is "complete identity" between the class claim and subsequent claim. *See* Def.'s Reply ("Reply") 2–4, ECF No. 18.

"There are two competing approaches to determining when class-action tolling applies." *Brasier v. Union Pac. R.R. Co.*, No. CV-21-00065-TUC-JGZ, 2021 WL 6101432, at *3 (D. Ariz. July 20, 2021), *R. & R. adopted by* 2021 WL 5505087 (D. Ariz. Nov. 24, 2021). Some courts recognize class action tolling when the claims in the follow-on suit "share a common factual basis and legal nexus" with the class claims, whereas others require complete identity of claims between the two suits. *Id.* (quoting *Newby v. Enron Corp. (In re Enron Corp. Sec.)*, 465 F. Supp. 2d 687, 718 (S.D. Tex. 2006)); *see also Drennen v. PNC Bank, NA (In re Cmty. Bank of N. Va.)*, 622 F.3d 275, 299–300 (3d Cir. 2010) (collecting cases). Two courts in this District have applied the latter, narrower rule to *Harris* follow-on suits. *See Carrillo*, 2021 WL 3023407, at *6; *Smithson*, 2022 WL 1506288, at *4.

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claims drop out of the case at the certification stage, it cannot be said that putative class members "may participate in the judgment" with respect to those claims. Thus, the suit no longer gives the defendant notice of "the number and generic identities of the potential plaintiffs" with an interest in such claims.

Courts that merely require commonality reason that *American Pipe* tolling should apply when the class action gives the defendant adequate notice of potential follow-on suits. *See, e.g.*, *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, No. 5:02CV1105, 2003 WL 25861087, at *17 (N.D. Ohio June 4, 2003) ("[C]omplete identity of claims is not necessary for class action tolling to apply. Rather, the Court . . . must look to whether the Defendants were on 'ample notice' by virtue of the previously-filed class complaint of the claims now asserted against them . . . . "); *see also Crown, Cork*, 462 U.S. at 354–55 (Powell, J., concurring) (stating that *American Pipe* sets forth a "generous" rule but should be limited to follow-on suits that "concern the same evidence, memories, and witnesses as the subject matter of the original class suit, so that the defendant will not be prejudiced" (internal quotation omitted)). Such courts have observed that demanding complete identity of claims would undermine the basic logic of *American Pipe* by requiring duplicative filings in a variety of situations. *See*, *e.g.*, *CSU Holdings v. Xerox (In re Indep. Serv. Orgs. Antitrust Litig.)*, No. MDL-1021, 1997 U.S. Dist. LEXIS 4496, at *19 (D. Kan. Mar. 12, 1997) (discussing *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1489 (9th Cir. 1985) and *Cullen v. Margiotta*, 811 F.2d 698, 721 (2d Cir. 1987)).

By contrast, courts that require the claims to be identical reason that the only way a defendant can have adequate notice of a follow-on suit is when the individual plaintiff brings the exact same claims as the class. *See, e.g.*, *Aguilar v. Ocwen Loan Serv'g, LLC*, No. 3:17-cv- 1165-B, 2018 WL 949225, at *6 (N.D. Tex. Feb. 20, 2018). This position is supported

by the Supreme Court's statement that *American Pipe* "depended heavily on the fact that [the class action] involved exactly the same cause of action subsequently asserted," because a defendant may only be able to "protect itself against the loss of evidence, the disappearance and fading memories of witness, and . . . unfair surprise" when "there is complete identity of the causes of action." *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 467 & n.14 (1975).

Broadly speaking, this is a difficult issue that has divided courts for decades. However, under the particular circumstances of this case, the Court believes that complete identity of claims is not necessary. It is certainly true that, as another court in this District recently observed, "[t]he Supreme Court has 'consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact'"—namely, that disparate treatment requires a showing of intent, whereas disparate impact involves the unequal effects of a facially neutral policy. *See Smithson*, 2022 WL 1506288, at *4 (quoting *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003)). However, the Court respectfully notes that it is also well established that evidence of disparate impact can be relevant to a finding of disparate treatment. *See Crain v. City of Selma*, 952 F.3d 634, 641 (5th Cir. 2020) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)) ("A discriminatory motive can sometimes be inferred from the mere fact of differences in treatment." (cleaned up)); *Hill v. Miss. State Emp. Serv.*, 918 F.2d 1233, 1238 (5th Cir. 1990) ("[C]ircumstantial evidence of disparate treatment often includes . . . statistical

evidence, and a finding of disparate impact requires statistically significant disparities.").[4] Had the *Harris* class survived, it appears likely that the named plaintiffs would have relied on evidence that Defendant's challenged policies had a disparate impact on disabled employees to support their disparate treatment claim. *See* Memo. Supp. Class Cert. 15–16 (discussing statistical evidence of the fitness-for-duty program's effect on employees who were evaluated after experiencing a "reportable health event"), 23 (stating that plaintiffs have evidence that Defendant was "aware of the discriminatory intent *and outcomes* of its policy" (emphasis added)).

The Court therefore respectfully disagrees with its sister courts that have recently dismissed *Harris* follow-on plaintiffs' disparate impact claims as time-barred. The class's disparate treatment claim put Defendant on notice that it would need to preserve evidence that would also pertain to putative class members' potential disparate impact claims based on the same fitness-for-duty testing policy.[5] As such, the

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[4] As the cited cases demonstrate, this rule has been most often applied to Title VII cases. However, the Court sees no reason why it should not apply in the ADA context. *See generally Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 234 (5th Cir. 2001) (discussing the "similar . . . language . . . purposes and remedial structures" of Title VII and the ADA).

[5] This is not to say that *every* disparate treatment claim will be able to draw on evidence of disparate impact. For instance, if Plaintiff alleged that he had been placed on indefinite leave for pretextual reasons due to a particular supervisor's animus, then evidence about the unequal effects of a broad policy might be irrelevant to his claim. *See generally Pacheco v. Mineta*, 448 F.3d

disparate treatment claim satisfied the purpose of the statute of limitations articulated in *American Pipe*. *See* 414 U.S. at 554 ("[S]tatutory limitation periods 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.'" (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944))). This case presents a situation where the relationship between two distinct causes of action is such that they share "the same or very similar elements, thus providing Defendant[] with notice and allowing [it] to rely on the same evidence and witnesses in [its] defense[]" against the new claim in the follow-on suit.[6]

783, 792 (5th Cir. 2006) ("[A] disparate-impact investigation could not reasonably have been expected to grow out of [plaintiff's] administrative charge [for disparate treatment] because . . . it identified no neutral employment policy . . . ."). Here, however, the two claims are presented as alternative theories about the exact same "fitness-for-duty" testing procedure. *See* Compl. ¶¶ 47–49, 53–56. As demonstrated by the *Harris* plaintiffs' arguments in support of class certification, *see* Memo. Supp. Class Cert. 15–16, evidence of that policy's disparate impact could be relevant to proving Union Pacific's intent, *see, e.g.*, *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1166 (9th Cir. 2013) (observing that statistical evidence of a local ordinance's discriminatory impact could be "helpful" to show discriminatory motive, even if plaintiffs had waived their disparate impact claim). The Court expresses no opinion at this time on whether Plaintiff's allegations make out either claim.

[6] The Court questions if even an individual case with an "identical" follow-on claim will necessarily have the same elements and rely on the same evidence as the class claim. For example, if an individual plaintiff files in a different circuit from where the class claim was filed—as is true in this case—the

See Newby, 465 F. Supp. 2d at 718–19. There is no risk that Union Pacific's defense could be prejudiced by "the loss of evidence, the disappearance and fading memories of witness, and . . . unfair surprise" regarding Plaintiff's disparate impact claim. *See Johnson*, 421 U.S. at 467 n.14. Moreover, the fact that the same policy is at issue in both claims means that the *Harris* disparate treatment claim notified Defendant "of the number and generic identities of the potential plaintiffs who may participate" in individual disparate impact claims. *See Am. Pipe*, 414 U.S. at 555. The Court sees no reason why class action tolling should not apply.

C. Failure to Accommodate

Plaintiff argues that his failure to accommodate claim is timely because Defendant's failures to accommodate and to engage in the interactive process are ongoing: "Each day that Union Pacific fails to engage Plaintiff—a current employee—in the interactive process is a new, discrete violation of the ADA." Resp. 10. Defendant argues that Plaintiff does not adequately allege that he has attempted to engage in any sort of ongoing interactive process that could bring his claim within the statute of limitations. Reply 9–10.

The Court agrees with Defendant. Plaintiff's argument that Defendant had an ongoing duty to

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follow-on court may apply meaningfully different law to that "identical" claim. But if such differences required individual Plaintiffs in different circuits to file their own suits to preserve their claims, the core logic of *American Pipe* would be gutted. *See Hall*, 727 F.3d at 375 (referring to class action tolling as a "brightline rule" intended to "reduc[e] repetitious and unnecessary filings").

engage in the interactive process is a correct statement of law, but Plaintiff "neglects that the interactive process is a two-way street; it requires that employer and employee work together, in good faith, to ascertain a reasonable accommodation." *See Dillard v. City of Austin*, 837 F.3d 557, 563 (5th Cir. 2016). After Plaintiff failed the color-vision test, Defendant told him his "restrictions could not be accommodated" and refused to let him retake the test. Compl. ¶¶ 30, 33–34. This refusal to provide any accommodation was a discrete act that accrued on the date that it occurred. *See Henson v. Bell Helicopter Textron, Inc.*, 128 F. App'x 387, 391 (5th Cir. 2005) (per curiam). Thus, Plaintiff cannot indefinitely extend the statute of limitations by contending that Defendant was required to approach him with a new offer of an accommodation after it denied his first request.

Plaintiff must, at the very least, allege that he attempted to participate in the interactive process such that his EEOC Charge was timely. His Complaint does not do so.[7] He states that, after he

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[7] Defendant argues that the Court need not even reach the Complaint because Plaintiff's EEOC Charge does not describe any "alleged attempts to contact Union Pacific and return to work after being removed from service, and so Plaintiff "cannot rely on these unexhausted allegations to make his charge timely." Reply 10. But EEOC charges need not be as detailed as a complaint; the charge exhausts "any kind of discrimination like or related to allegations contained in the charge." *See Franklin v. City of Slidell*, 936 F. Supp. 2d 691, 709–10 (E.D. La. 2013) (quoting *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 711 (5th Cir. 1994)). The Court finds that Plaintiff's statements that "Union Pacific refused to accommodate the restrictions that it imposed on me," "would not

was placed on leave, he "contacted Union Pacific on one or more occasions . . . to request that he be allowed to return to work in a different craft or position," but does not describe when those occasions took place. As such, the Complaint does not allege that he sought a reasonable accommodation within three-hundred days of filing his EEOC Charge.[8] The claim is time-barred.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion, ECF No. 13, is **GRANTED** in part and **DENIED** in part. The Motion is **GRANTED** as to Plaintiff's failure to accommodate claim and **DENIED** as to Plaintiff's disparate impact claim. Plaintiff's failure to accommodate claim (Count III) is **DISMISSED**.

SO ORDERED.

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allow me to return to my job," and "continues to refuse to return me to work" would exhaust his failure to accommodate claim if that filing were timely. *See* EEOC Charge 1.

[8] Defendant further argues that, even if Plaintiff had so alleged, his failure to accommodate claim would be time-barred because "an employer 'standing by a prior denial [of accommodation] after an employee requests reconsideration' does not extend the limitations period." Mot. 16 (quoting *Das v. Am. Airlines*, No. 4:19-CV-870-A, 2020 WL 364264, at *3 (N.D. Tex. Jan. 21, 2020)). However, the facts about Plaintiff's attempts to engage in the interactive process are sparse; it is not clear to the Court if Plaintiff's request to work in a different position was indeed duplicative of his first request for an accommodation. *See* Compl. ¶¶ 30, 33–36. Perhaps the claim would be time-barred no matter what Plaintiff alleged, but the Court cannot apply the statute of limitations to facts that are not given.

SIGNED on this 15th day of June, 2022.

/s/ Kathleen Cardone
KATHLEEN CARDONE
UNITED STATES
DISTRICT JUDGE