No. 24-643

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

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

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REPLY BRIEF FOR PETITIONER

Respondent does not dispute that the Fifth Circuit significantly expanded the scope of *American Pipe* tolling. Whereas this Court held that only "asserted members of the class" are entitled to equitable tolling, *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), the Fifth Circuit held that persons who were *not* members of the class are *also* entitled to tolling—so long as they have not been "unambiguously excluded[d]" from the class, App. 2a.

Respondent makes three arguments in opposition to certiorari. None has merit and this Court should grant review or, at a minimum, hold this petition for *DeFries v. Union Pac. R.R. Co.*, No. 24-630, or *DeGeer v. Union Pac. R.R. Co.*, No. 24-610.

First, respondent claims there is no circuit split. But he cannot credibly deny that the Fifth Circuit's "unambiguously excluded" standard differs from the standard the Fourth and Tenth Circuits apply for *American Pipe* tolling. Both of those courts simply ask, consistent with *American Pipe* itself, whether the bystander plaintiff was a member of the class. *See Smith v. Pennington*, 352 F.3d 884 (4th Cir. 2003); *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248 (10th Cir. 1994). The Fifth Circuit's standard adopts the standard followed in the Ninth and Eighth Circuits. *See DeFries v. Union Pac. R.R. Co.*, 104 F.4th 1091 (9th Cir. 2024); *DeGeer v. Union Pac. R.R. Co.*, 113 F.4th 1035 (8th Cir. 2024). And many courts, including the Ninth Circuit and the lower court in this case, have expressly recognized the confusion and disagreement in the courts over the correct legal standard.

Second, respondent contends that the Fifth Circuit's expansion of *American Pipe* was "necessary" because, in the words of that court, "anything short of unambiguous [exclusion] would undermine the balance contemplated by [the *American Pipe*] Court." Opp. 23 (quoting App. 16a).[1] But the Fifth Circuit's rule *upsets* that balance and directly conflicts with *American Pipe* and the way this Court has always interpreted the rule for equitable tolling. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983) (stating the "holding" of *American Pipe* is that "[t]he filing of a class action tolls the statute of limitations *as to all asserted members of the class*") (emphasis added and quotation marks omitted). Respondent says the Fifth Circuit's rule will avoid causing a rush to the courthouse by bystander plaintiffs. Opp. 15. But this Court has repeatedly rejected that exact rationale in cases where, as here, the lower court expanded the availability of *American Pipe* tolling beyond anything this Court has ever allowed.

Third, respondent argues that this case is a poor vehicle because the Fifth Circuit supposedly found that respondent was a class member. But the Fifth Circuit simply stated the factual record "suggested" respondent was a member of the class. App. 15a. Although respondent cites evidence that he says proves he was a class member, that is a question that can be decided on remand once this Court has clarified the correct legal standard for equitable tolling.

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[1] Citations to the Brief in Opposition are to the respondents' Brief in Opposition in *DeFries*, No. 24-630, which was filed as a consolidated opposition to the petitions in *DeFries, DeGeer*, No. 24-610, and here.

Three times in the last decade this Court has granted review to rein in lower courts' unwarranted expansions of equitable tolling. *See Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250 (2016); *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497 (2017); C*hina Agritech, Inc. v. Resh*, 584 U.S. 732 (2018). This case is equally deserving of review.

I. The Circuits Are Split Over The Question Presented.

Respondent denies a circuit split. But there can be no serious dispute that the Ninth, Eighth, and Fifth Circuits have adopted a legal standard for tolling (whether bystander plaintiffs are "unambiguously excluded" from the class) that is at odds with the legal standard applied in the Fourth and Tenth Circuits (whether bystander plaintiffs are members of the class). *See Smith v. Pennington*, 352 F.3d 884 (4th Cir. 2003); *Sawtell v. E.I. du Pont de Nemours & Co*., 22 F.3d 248 (10th Cir. 1994). While the Fifth Circuit's rule turns on the existence of ambiguity—*see* App. 15a (looking to whether the class definition "unambiguously exclude[d]" respondent)—the Fourth and Tenth Circuits both apply a rule of decision that has nothing to do with ambiguity but simply turns on class membership.

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

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

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

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

Respondent similarly mischaracterizes the Tenth Circuit's rule. Here is how respondent describes *Sawtell*:

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

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

> Ms. Sawtell has presented no evidence supporting the inference she was a putative member of the class. … The Supreme Court held "'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.'" *Crown, Cork & Seal*, 462 U.S. at 353–54 (quoting *American Pipe*, 414 U.S. at 554). Ms. Sawtell would not have been a party to the Minnesota suits had any of them continued as a class action. The statute of limitations should not be tolled.

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

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

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

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

The district court recognized that this is "a difficult issue that has divided courts for decades," App. 47a, and the Ninth Circuit acknowledged that "[t]he problem has split many district courts," 104 F.4th at 1097. Respondent cites the Newberg treatise for the point that the circuits are aligned in cases where the bystander plaintiff is "clearly excluded" from the class. Opp. 3, 18. But respondent does not suggest that *this* is such a case, so the alignment of the circuits on a question not presented here does not defeat the existence of a circuit split on the question that *is* presented.

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

Respondent begins his statement with the following sentence:

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

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

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

Respondent does not deny that the Fifth Circuit extended *American Pipe* well beyond its holding. According to the Fifth Circuit, the rule it adopted was necessary because to do otherwise "would undermine the balance contemplated by the Supreme Court." App. 16a. The Fifth Circuit's assertion that a radical

expansion of *American Pipe* was necessary to maintain the "balance" this Court contemplated is not just presumptuous, but wrong.

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

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

trigger the statute of limitations on their individual claims. Indeed, even under respondent's preferred rule, class members must still monitor proceedings and parse any changes to class definitions to determine if the class definition has been narrowed in a way that unambiguously excludes them.

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

III. The Petition Should Be Granted Or Held for *DeFries* and *DeGeer*.

The consolidated opposition brief filed in this case, *DeFries*, and *DeGeer* argues that the petitions present poor vehicles for the Court to resolve these issues. Respondent's arguments are misplaced.

First, respondent's arguments as to whether he is actually a member of the class is beside the point in determining whether "the question presented is … actually presented." Opp. 21. The question presented concerns the legal standard for when a bystander plaintiff is entitled to *American Pipe* tolling. If respondent is correct that he was a class member, that simply means he will prevail on remand when the court of appeals applies the correct legal standard for tolling. Whether respondent will in fact be able to prove on remand that he was a class member has no bearing on whether the question presented is actually presented. It is.

Second, the court of appeals repeatedly made clear that while it thought it likely that respondent was a member of the decertified class, that proposition

was inessential to its holding, and any remarks to that effect were necessarily only dicta. Thus, the court acknowledged that Union Pacific's position that respondent was not a class member "may prove to be true." App. 14a. It concluded its opinion by emphasizing that it was "[a]t least" the case that respondent was not "*unambiguously excluded*" from the decertified class, App. 16a. Thus, the court of appeals in this case, like the courts in *DeFries* and *DeGeer*, ultimately rested its holding on the rule that mere ambiguity as to a plaintiff's class membership suffices for *American Pipe* tolling. And reliance on that rule, in turn, meant that the question that should have been resolved—whether the district court committed reversible error in finding that respondent was *not* a member of the decertified class—never needed conclusive resolution.

Third, respondent is wrong to proclaim that "even if this Court were to adopt Union Pacific's preferred rule, the outcome of each case would remain unaffected." Opp. 21. Respondent cannot make this prediction with such confidence when each district court independently held that the respondent was *not* a member of the class. To be sure, respondent disagrees and cites various reasons why he should be deemed a member of the class—*e.g.*, he was on a list of purported class members, and similar plaintiffs on that list submitted declarations that Union Pacific referred to in its appeal to the Eighth Circuit. *See* Opp. 21. Respondent also suggests that Union Pacific may be estopped even from taking the position that he was not a class member. *See* Opp. 4. But all of these arguments—which did not persuade the district court below—go to the merits of respondent's tolling claim

and will be addressed by the court of appeals on remand once this Court confirms the correct legal standard. None of them pose an impediment to granting review.

If the Court grants certiorari and resolves *DeFries* and *DeGeer*, any holding in those cases as to the correct application of *American Pipe* tolling would bear directly upon resolution of this case. Thus, Union Pacific respectfully requests that the Court grant or at least hold this petition 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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February 26, 2025