No. 17-432

IN THE

Supreme Court of the United States

CHINA AGRITECH, INC.,

Petitioner,

—v.—

MICHAEL H. RESH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AARP AND AARP FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age.[1] With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to ensure that low-income older adults have nutritious food, affordable housing, a steady income, and strong and sustaining bonds.

One area where Amici have engaged in vigorous advocacy is urging the robust enforcement of the securities laws through class actions. With the decline of traditional pensions, older Americans are more dependent than ever on the value of stocks in their personal portfolios or 401(k) plans. This case has critical implications in that regard. At issue is whether defrauded investors can bring their claims *in the form of class actions* after the statute of limitations has expired in circumstances where they otherwise could bring "tolled" individual actions under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). AARP as Amicus has previously

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[1] Pursuant to Rule 37.3, counsel for Amici affirm that this brief has been filed with the written consent of the parties, which filed blanket consents with the Court. Pursuant to Rule 37.6, counsel for Amici affirm that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Amici or their counsel, make a monetary contribution to fund the preparation or submission of this brief.

urged this Court to continue to apply these tolling principles to the securities laws, recognizing the critical importance to AARP members of vigorous class action enforcement in the securities arena. *See*, *e.g.*, Brief of AARP as *Amicus Curiae* in Support of Petitioner, *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, No. 13-640, 2014 WL 2361885 (U.S. May 28, 2014).

Today, Amici urge the Court to confirm that such permissible claims can be brought in the form offering the most realistic prospect of relief for most individual investors—as class actions. Robust private enforcement of the securities laws through class actions is critical to the financial security of older Americans. Many older adults have no access to advice from financial advisors or fiduciaries and are not in a position to independently evaluate the value or risk of complex securities instruments. Government enforcement, alone, does not guarantee the safety of the financial markets, as evidenced by the massive securities frauds that helped spawn the 2008-2009 financial crisis. The availability of class actions in the circumstances presented in this case is a critical added avenue to ensure adequate relief and market oversight.

As the nation's largest membership organization, AARP has also engaged in extensive advocacy and litigation in other areas, such as consumer protection, employment discrimination, employee benefits, and affordable housing. In all these areas, the availability of class action litigation is often critical to AARP's efforts. The present case is likely to have a significant impact on older adults' access to legal remedies in these areas as well.

INTRODUCTION AND SUMMARY OF ARGUMENT

Today, Americans of modest means who seek to remedy securities law violations affecting their retirement savings are increasingly on their own. The percentage of Americans whose retirement savings are held in investments managed by pension funds and other large institutional investors has been dwindling for decades.[2] As this Court has often noted, the class action device was made for such claimants; it allows the aggregation of modest claims that would not be feasible if brought individually. *See*, *e.g.*, *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). In so doing, "Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-53 (1983).

But as this Court has also noted, class certification turns on a variety of "subtle factors" that engender significant uncertainty. *American Pipe*, 414 U.S. at 553. For that reason, the rules should not require "successful anticipation of the determination of the viability of the class." *Id.* at 553-54. *American Pipe*'s tolling rule protects absent class members not only by allowing them to rely on the named plaintiffs

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[2] Approximately half of Americans now save for retirement using self-directed retirement plans, such as 401(k), 403(b), and other defined contribution and individual retirement accounts, compared to only 25 percent who have savings in defined benefit pension plans. Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2016* 57 (May 2017), https://www.federalreserve.gov/publications/files/2016-report-economic-well-being-us-households-201705.pdf.

to protect their rights, but also by enabling them to pursue their claims by other means should those original named plaintiffs fail to obtain class certification.

Petitioner asks this Court to significantly limit this protection by permitting members of a class to pursue only *individual* claims following an initial denial of class certification. This limit would apply, under Petitioner's rule, regardless of the reason the initial action did not achieve class treatment—even if that reason provided little reason to think that other plaintiffs could not successfully secure class treatment. This new limit would be both bad for the courts and bad for plaintiffs. It would be bad for the courts because, in order to protect their own ability to proceed in a class action, absent class members would be forced to undertake their own protective class filings within the limitations period as a hedge against denial of the named plaintiffs' class motion. And it would be bad for plaintiffs—especially plaintiffs of modest means—because if they failed to protect themselves in this way they would be left with individual claims that would generally be infeasible to litigate separately. The only entities that would continue to benefit from *American Pipe*'s tolling rule would be those parties—chiefly pension funds, large corporations, or wealthy individuals—with large enough claims and resources to go forward on their own.

This brief primarily addresses Petitioner's argument that *American Pipe* tolling is not only equitable in its origin but also bounded by the narrower doctrine of equitable tolling in cases like *Menominee Indian Tribe of Wisconsin v. United*

States, 136 S. Ct. 750 (2016). That narrower doctrine emphasizes the plaintiff's diligence rather than the broader policies of fairness and judicial economy furthered by Federal Rule of Civil Procedure 23. But neither the equitable tolling cases Petitioner relies upon nor, more importantly, *American Pipe* or *Crown, Cork*, support Petitioner's argument. The latter cases framed a tolling doctrine that, while grounded in the courts' equitable discretion, took account of a broader set of values associated with the class action rule. As such, *American Pipe* is a close family relation of other prudential doctrines that further systemic values, such as aspects of the justiciability doctrine or the equitable abstention rules.

In any event, *American Pipe* necessarily stands for the proposition that an absent class member who relies on a filed class action has exercised all the diligence that is required, up until the point that class certification is denied. It makes no sense to say, at that point, that it is less "diligent" for that absent class member to file a new class action claim than an individual claim. Moreover, Petitioner's distinction would create the same incentives for protective filings that *American Pipe* and *Crown, Cork* sought to prevent. Any absent class member whose claims could not feasibly be litigated on an individual basis would be forced to file protective class claims within the limitations period, thereby undermining Rule 23's judicial economy goals even more greatly than the protective individual claims that worried this Court in its earlier decisions.

Consequential concerns cut strongly against Petitioner's argument here. The risk that defendants will face an infinite regress of follow-on class actions is negligible for two reasons. First, the applicable statute of repose cuts off that risk in the present context and under many other statutory regimes with a similar limitations structure. Second, as this Court stated in a related context, judicial comity can safeguard against re-litigation of class certification issues. *See Smith v. Bayer Corp.*, 564 U.S. 299, 317 (2011). More broadly, Petitioner's rule against tolling for non-class claims would radically tilt the playing field of private enforcement of federal law in favor of large players, such as pension funds and corporations, that have the incentives and wherewithal to litigate their claims individually. This would significantly jeopardize the rights of persons of modest means, including many of the older persons whom Amici represent. And it would turn the policies of the class action rule that *American Pipe* sought to further on their head.

ARGUMENT

I. TOLLING UNDER *AMERICAN PIPE* IS NOT CONSTRAINED BY THE PLAINTIFF'S DILIGENCE.

This Court held in *American Pipe* 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." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). Petitioner insists that *American Pipe*'s tolling rule is not only grounded in the courts'

equitable discretion but *limited* by a traditional doctrine of equitable tolling that places a primary focus on the plaintiff's diligence (or lack thereof). *See* Pet. Br. at 18 (asserting that "[p]laintiff diligence has always been an absolute prerequisite for equitable tolling"). There is no doubt that *American Pipe*'s tolling rule is equitable in a broad sense, but that is quite different than saying it is limited by the specific doctrine of "equitable tolling" focused on plaintiff diligence. The cases that Petitioner relies upon for this proposition hold no such thing.

To the contrary, systemic concerns about judicial economy and class action policy under Rule 23 drive *American Pipe*'s tolling rule. That is the consistent thrust of this Court's cases that actually construe and apply the rule. Nor is this mix of equitable flexibility and systemic prudence at all unusual. This Court's doctrines of prudential justiciability and equitable abstention likewise rely on the flexibility afforded by equity to pursue systemic values.

Even if the plaintiff's diligence were a prerequisite to tolling under *American Pipe*, that would not support Petitioner's request for a categorical rule precluding plaintiffs benefiting from tolling from filing class rather than individual claims. Moreover, *American Pipe* itself makes clear that so long as a party falls within a pending class action, diligence requires no further action; hence, Respondents and the absent class members here were diligent in the only way *American Pipe* requires. Petitioner has offered no explanation why "diligence" turns on the procedural vehicle—an

intervention or a class action—chosen by a party when she ultimately does file a claim.

Finally, the only "extraordinary circumstances" that this Court has ever required under *American Pipe* is that refusal to toll a party's claims would undermine the judicial economy that Rule 23 seeks to promote. That is plainly true here. If tolling turns on the procedural vehicle that a party chooses down the line, then class members worried that the initial named plaintiffs may fail to obtain class certification will be forced to make protective class filings of their own. That result would be even worse for judicial economy than the protective *individual* filings that concerned the Court in *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

A. *American Pipe* tolling is equitable in nature but distinct from traditional equitable tolling rules focusing on the plaintiff's diligence.

This Court has referred to *American Pipe* as a form of equitable tolling on a number of occasions. *See*, *e.g.*, *Young v. United States*, 535 U.S. 43, 49 (2002); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990). Neither *Young* nor *Irwin*, however, purported to apply or construe *American Pipe*'s tolling doctrine. Critically, neither came close to suggesting that *American Pipe*'s tolling rule is *limited* by traditional tolling doctrine's emphasis on the plaintiff's diligence.

Petitioner relies heavily on *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750 (2016)—citing it seven times, including for the basic

statement of "established equitable principles" that "authorize tolling only when the plaintiff 'has been pursuing his rights diligently' *and* when tolling is otherwise justified by 'extraordinary circumstances.'" Pet. Br. at 25-26 (quoting *Menominee*, 136 S. Ct. at 755) (emphasis in original). But *Menominee* actually cuts the other way. In that case, the Menominee Tribe sought "to preserve contract claims not timely presented to a federal contracting officer." 136 S. Ct. at 753. It relied on two distinct tolling theories: "class action" tolling under *American Pipe* and "equitable" tolling under *Holland v. Florida*, 560 U.S. 631 (2010).[3] The district court rejected both theories, and the District of Columbia Circuit agreed with respect to class action tolling under *American Pipe*, finding that the Tribe would have been ineligible to participate in the relevant class action at the time that class certification was denied. *See Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 527 (D.C. Cir. 2010). But the Court of Appeals reversed the district court's holding that the statutory limitations period forbade equitable tolling and remanded to determine the Tribe's eligibility for tolling on that theory. *That* issue is the one that, following remand, ultimately reached this Court in *Menominee*. *See* 136 S. Ct. at 753. The diligence-

[3] *Holland* is a good example of when plaintiff diligence *is* central to the tolling analysis. In that case, a Florida prisoner sentenced to die for capital murder filed a *pro se* federal habeas corpus petition five weeks late under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d). The Court held that AEDPA's limitations period was subject to equitable tolling and that the petitioner had diligently urged his court-appointed attorney to file the petition on time. *See Holland*, 560 U.S. at 645-49, 653.

based criteria for which Petitioner cites *Menominee* describe an equitable doctrine that the Court explicitly distinguished from *American Pipe*. *See id.* at 754-55; *see also id.* at 755 (making clear that the diligence plus extraordinary circumstances criteria apply under *Holland*'s doctrine of equitable tolling).[4]

The best case for Petitioner is this Court's decision last term in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017). *ANZ* held that the 3-year repose period for claims brought under the Securities Act of 1933 was *not* subject to tolling under *American Pipe*. In order to reach that result, the majority needed to decide whether *American Pipe*'s tolling rule was fundamentally statutory or equitable in origin.[5] But the Court's inquiry was focused on the *nature* of the class action tolling rule; it did not purport to explore *American Pipe*'s requirements or scope. Most critically, *ANZ* recognized that *American Pipe* did not track the usual criteria for equitable tolling. Justice Kennedy's majority opinion acknowledged that "the *American Pipe* Court did not consider the criteria of the formal doctrine of equitable tolling in any direct manner." 137 S. Ct. at 2052. In particular, this Court

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[4] Similarly, this Court discussed *American Pipe* and equitable tolling as distinct doctrines just last month in *Artis v. District of Columbia*, 138 S. Ct. 594, 602 (2018).

[5] This Court reasoned that "[i]f *American Pipe* had itself been grounded in a legislative enactment, perhaps an argument could be made that the enactment expressed a legislative objective to modify the 3-year period [of repose]. If, however, the tolling decision in *American Pipe* derived from equity principles, it cannot alter the unconditional language and purpose of the 3-year statute of repose." *ANZ*, 137 S. Ct. at 2051.

noted that *American Pipe* "did not analyze . . . whether the plaintiffs pursued their rights with special care; whether some extraordinary circumstance prevented them from intervening earlier; or whether the defendant engaged in misconduct." *Id.* Although the Court ultimately concluded that "[t]he balance of [*American Pipe*'s] reasoning nonetheless reveals a rule based on traditional equitable powers," *id.*, the Court did *not* say that *American Pipe* tolling is limited by a more specific doctrine of equitable tolling.

ANZ's conclusion that the *American Pipe* rule is equitable in nature is perfectly consistent with the Court's recognition that class action tolling is distinct from the diligence-based equitable tolling in cases like *Holland v. Florida*. If it were true that "courts may not apply equitable tolling rules that 'break with historic principles of equity,'" Pet. Br. at 25 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946)),[6]

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[6] The full quote from *Holmberg* is as follows: "When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." 327 U.S. at 395. *Holmberg* is about the importance of adhering to traditional equitable principles when Congress creates an explicitly equitable federal right. *See id.* ("The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity."). It did not involve class actions—an innovative procedure with origins in equity but much altered by contemporary imperatives. *See*, *e.g.*, *Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64 (1975) (tolling rules must be understood against a broad background of statutory policies, not just traditional equity). To paraphrase *Holmberg*, when Congress approves an elaborate procedure for aggregate litigation, it can expect the federal courts to use their

then *American Pipe* would have read much differently and might have come out the other way. But this Court has made clear that the class action tolling rule rests on Rule 23 and the policies arising out of that rule.[7] The *American Pipe* Court said that "[w]e 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." 414 U.S. at 554.[8] Likewise, *Crown, Cork*

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equitable discretion to facilitate the underlying policies of the class procedure.

[7] *See*, *e.g.*, *ANZ*, 137 S. Ct. at 2051 (noting that *American Pipe*'s rule "furthered 'the purposes of litigative efficiency and economy' served by Rule 23") (quoting *American Pipe*, 414 U.S. at 556). This point answers Petitioner's odd suggestion that *American Pipe* would be unconstitutional were it to exceed the traditional scope of equitable tolling. *See* Pet. Br. at 45-46. *American Pipe* rests on Rule 23's policies as well as traditional equitable doctrine. *See American Pipe*, 414 U.S. at 556-59 (holding that the federal courts have power to toll limitations so long as it is "consonant with the legislative scheme"). This Court has long recognized an extensive scope for federal common law rules derived from a variety of federal interests and statutory policies—not simply from the rules of equity. *See*, *e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). Federal courts thus have ample authority to shape *American Pipe* tolling in such a way as to facilitate the federal policies embodied in Rule 23.

[8] *See also American Pipe*, 414 U.S. at 545-52 (discussing history and policies of Rule 23); *id.* at 553 ("A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive

discussed policies associated with Rule 23 nearly exclusively, without any consideration of the individual equities of the case. *See* 462 U.S. at 350-51. Other cases invoking *American Pipe* similarly have relied heavily on Rule 23.[9] Petitioner thus acknowledges—as it must—that "[t]olling was justified for individual claims [in *American Pipe*] because a contrary rule would undermine Rule 23 by inviting protective individual litigation while a class action was still pending." Pet. Br. at 19-20.

B. *American Pipe*'s focus on concerns of judicial economy and effective aggregate litigation is consistent with other prudential and equity-based doctrines protecting systemic values.

There is nothing unusual or untoward about a doctrine—like *American Pipe*—that uses equitable flexibility to protect systemic values. Two prominent examples are this Court's prudential tests for justiciability, which are directed in substantial part toward protecting the federal courts' ability to adjudicate claims, and its abstention doctrines, which protect systemic values of comity and

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Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure.").

[9] *See*, *e.g.*, *Chardon v. Fumero Soto*, 462 U.S. 650, 661 (1983) ("*American Pipe* simply asserts a federal interest in assuring the efficiency and economy of the class action procedure."); *Johnson*, 421 U.S. at 466 n.12 ("In the light of the history of Fed. Rule Civ. Proc. 23 and the purposes of litigatory efficiency served by class actions, we concluded [in *American Pipe*] that the prior [class action] filing had a tolling effect.").

federalism. These doctrines rest significantly on equitable discretion, but their concerns extend well beyond the diligence or hardships of the parties.

The justiciability doctrines dealing with standing, ripeness, mootness, finality, and adversary presentation are grounded in Article III's requirement of a "Case" or "Controversy," but this Court has long recognized that many aspects "express merely prudential considerations that are part of judicial self-government." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). These prudential doctrines are often linked to notions of equitable discretion.[10] In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), for example, Justice Harlan grounded his ripeness analysis not in Article III but rather in the fact that "[t]he injunctive and declaratory judgment remedies are discretionary." *Id.* at 148; *see also id.* at 155 (emphasizing that "the declaratory judgment and injunctive remedies [sought by the plaintiff] are equitable in nature"). That analysis was directed in part at the interests and conduct of the parties, *see id.* at 152-54, but also focused on the judicial system's interest in ensuring that questions presented would be "appropriate for judicial resolution," *id.* at 149. Similarly, in *United States v. Windsor*, 133 S. Ct. 2675 (2013), this Court recognized a prudential requirement of "concrete adverseness" that furthers systemic interests in "sharpen[ing] the presentation of issues upon which the court so largely depends for illumination of

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[10] *See*, *e.g.*, Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 156 (7th ed. 2015).

difficult constitutional questions," *id.* at 2687 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The abstention doctrines are an even clearer example. Those doctrines, by which federal courts defer to state court adjudication in various circumstances, rest explicitly upon the equitable discretion afforded by a plaintiff's request for injunctive relief. *See*, *e.g.*, *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (grounding abstention in equitable rule against restraining criminal prosecutions); *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) (grounding abstention in plaintiff's "appeal to the chancellor," which is "an appeal to the exercise of the sound discretion, which guides the determination of courts of equity") (internal quotation marks and citation omitted); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996) (holding that discretion to dismiss claims altogether pursuant to abstention principles is limited to cases where the plaintiff seeks equitable relief).

These equitable doctrines explicitly rest, however, on systemic as well as party-centered considerations. In *Pullman*, for example, Justice Frankfurter stressed considerations of judicial economy and optimal decision-making similar to those in the justiciability cases, *see* 312 U.S. at 499-500, as well as structural federalism concerns, *see id.* at 501. And in *Younger*, Justice Black famously employed his equitable discretion to further values of "comity" and "federalism." 401 U.S. at 44-45.

These examples demonstrate that the scope of concerns furthered by equitable flexibility is considerably broader than the compass that

Petitioner would give them. This Court's standard for injunctive relief has long included not only considerations relevant to the particular parties' diligence and interests but also the *public* interest. *See Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) ("In assessing the lower courts' exercise of equitable discretion, we bring to bear an equitable judgment of our own. . . . Before issuing a stay, it is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large."). In the travel ban case, for example, this Court relied on a systemic interest in national security in granting the Government's stay application in part. *See id.* at 2088 ("The interest in preserving national security is an urgent objective of the highest order."). Likewise, the concerns for preserving the integrity of judicial decision-making in the justiciability cases and for comity and federalism in the abstention cases are valid components of the public interest in any equitable calculus.

Much the same is true of *American Pipe*'s concerns for judicial economy and preserving the integrity of the class action procedure under Rule 23. *American Pipe*'s roots in equitable discretion does not mean that systemic concerns must give way to a dispositive focus on the plaintiff's diligence. Equitable principles have never been so limited in their concerns. But even if they had been, Professor David Shapiro rightly observed some years ago that "[t]he scope of [equitable] discretion should not be ruled by tradition alone; rather it should be informed by experience but remain sensitive to current needs

and problems." David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 580 (1985).

C. Parties in the posture of Respondents here have exercised diligence in the only sense that matters.

Petitioner asserts that "absent class members who do not file their own claims once the class fails and instead continue to remain absent obviously have not exercised any diligence at all." Pet. Br. at 18. Yet this is not at all obvious. To begin, there is a basic disconnect between the categorical rule that Petitioner seeks—that absent class members wishing to file class claims may *never* benefit from tolling—and the case-by-case equitable discretion that Petitioner's theory of diligence-based tolling demands.[11] In any event, as Petitioner necessarily acknowledges, *American Pipe* itself rests on the proposition that absent class members are sufficiently diligent if they rely on the filing of a class action to protect their rights.

The basic fallacy in Petitioner's argument lies in conflating three questions: (1) *when* diligence requires a party to take some action; (2) *what* action diligence requires that party to take; and (3) *who* may benefit from the tolling rule. *American Pipe*

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[11] *See*, *e.g.*, *Holland*, 560 U.S. at 650 ("In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity.") (internal quotation marks and citations omitted).

concerned the first question, and it held that absent class members need take no action while a class claim is pending. With respect to the second question, *American Pipe* said it was sufficient to intervene in an action that had been filed within the limitations period. *Crown, Cork* then held that it would also be sufficient for absent class members to file an individual action of their own. The present case concerns whether those absent class members could also file their own class actions. But *American Pipe* necessarily settled the third question as well: Its tolling rule applies to all absent class members in the initial class action.

Distinguishing between these three questions—the "when," the "what," and the "who"—renders Petitioner's error apparent. Petitioner insists that "the effect of extending *American Pipe* to follow-on class actions is to toll the limitations period for every absent class member, none of whom has done anything to assert her own rights once the first class action failed nor otherwise showed any interest in the litigation." Pet. Br. at 18-19. This objection seeks to limit *who* can take advantage of *American Pipe*'s tolling rule. But *American Pipe* made clear that its rule applied to every absent class member.[12] All that is left to argue—and the only appropriate focus of this appeal—is *what* an absent class member must do to assert her own rights once the first class action fails.

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[12] *See American Pipe*, 414 U.S. at 554 (stating that a timely 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).

Once we focus on this point, however, Petitioner's argument makes little sense. *American Pipe* makes clear that no absent class member is required to do anything while a class action is pending; the limitations period is tolled during that period. As *Crown, Cork* said, "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights." 462 U.S. at 352. Petitioner's claim is thus that although filing an *individual* claim once class certification is denied would be "diligent," filing a new *class* claim is not. It is hard to see why this would possibly be true.

Petitioner's argument derives some intuitive appeal from the happenstance that this case involves *three* successive class actions, not two. When the first class action—the *Dean* action—failed, Respondents filed no lawsuit of their own; rather, they relied (or were entitled, in Respondents' view, to rely) on the filing of the *Smyth* action. Only when that action, too, failed did Respondents file their own class claims.

While that may seem like a lot of inactivity, Petitioner's position is not limited to these unusual circumstances. Petitioner's position would have barred the *Smyth* class action, too, had *Smyth* been filed outside the 2-year limitations period. Petitioner insists that *American Pipe* tolling simply does not apply to class claims. Pet. Br. at 24.[13] The *Smyth* plaintiffs, in other words, would have been able to

[13] As a fallback position, Petitioner suggests that "tolling should not be available when (as here) the viability of the class has already been litigated and rejected." Pet. Br. at 23. That position would have barred the *Smyth* claims as well.

file only individual claims if the *Dean* plaintiffs had been denied class certification more than two years into the lawsuit. But this conclusion would have nothing to do with whether or not the *Smyth* plaintiffs were diligent—it is no less diligent to file a class claim and an individual claim.[14] And as *American Pipe* makes clear, all diligence required of the *Smyth* plaintiffs at the outset of the case was to rely on the *Dean* class action.

The relevant question is not whether Respondents were required to do *something* at the point that class certification was denied in the *Dean* case, but rather *what* Respondents were required to do. And the answer is the same under *American Pipe*: As long as a class action is pending, absent class members may rely upon it until class certification is denied, at which time the clock begins to run again. Critically, Petitioner does not dispute that the *Resh* class plaintiffs were entitled to rely on the *Dean* and *Smyth* class actions. Petitioner's oft-repeated point that this is the *third* class action in the sequence, *see*,

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[14] Perhaps Petitioner would answer that if one wishes to file a class claim, the *only* diligent course is to file one's own class claim within the un-tolled limitations period. That conclusion would turn every statute of limitations into a statute of repose for purposes of class actions. As a restriction *only* for class actions, Petitioner's position would conflict with this Court's ruling in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 408 (2010), that "[a] class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. . . . [I]t leaves the parties' legal rights and duties intact and the rules of decision unchanged." Moreover, it would be exceptionally hard to ground any such rule in traditional notions of equitable tolling, which do not differentiate between individual and aggregate claims.

e.g., Pet. Br. at 48, is thus entirely rhetorical. Petitioner has already conceded that it was no less "diligent" for Respondents to rely on the *Smyth* class action than on the *Dean* class action. And even if there *were* some reason to distinguish the two, Petitioner's proffered rule—that *American Pipe* tolls the clock only for individual claims, not class claims—would be too inflexible to take it into account. The sole question before the Court is whether an absent class member who has reasonably relied on a pending class action may, if that original class action fails, file her own class action instead of an individual claim.

Nor does the Private Securities Litigation Reform Act of 1995 (PSLRA) establish that Respondents were not diligent. Petitioner asserts that, because the PSLRA encourages all class members to come forward early in the litigation if they wish to be considered as lead plaintiffs, class members who do not do so are barred from bringing a subsequent class action for lack of diligence. *See* Pet. Br. at 19. That reads far more into the PSLRA's lead plaintiff provisions than they say. The PSLRA seeks to facilitate the litigation of the current class action; it hardly seeks to govern who can be a lead plaintiff in a subsequent action involving an overlapping class. The facts of this case illustrate the point. Petitioner does not seem to have argued that the *Smyth* plaintiffs were barred from filing their own class action (within the limitations period) simply because they had not come forward earlier seeking to be lead plaintiffs in the *Dean* class action. Nothing in the PSLRA purports to establish some sort of estoppel principle whereby parties passing up the

opportunity to apply for lead plaintiff status in one case are barred from doing so in the next. If the PSLRA were read to do so, that would likely choke the district courts with protective lead plaintiff filings. It would also likely leave injuries unremedied for individual investors who are most vulnerable to securities fraud—older individuals who must fend for themselves on an individual basis.

D. Failing to toll limitations for class claims would frustrate the purposes of *American Pipe*.

The same systemic concerns that supported tolling in *American Pipe* and *Crown, Cork* apply to the present case. Those decisions worried chiefly about the burden on the judicial system that would result if tolling were denied.[15] In that scenario, this Court said, absent class members would be forced to file their own claims as a hedge against the possibility that class certification might ultimately be denied. *See American Pipe*, 414 U.S. at 553-54; *Crown, Cork*, 462 U.S. at 350. After all, in many actions the class certification decision does not come until after the limitations period has run.[16] If tolling

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[15] *See American Pipe*, 414 U.S. at 553 (stating that "[a] contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure"); *Crown, Cork*, 462 U.S. at 350-51 (recognizing that "much the same inefficiencies would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification").

[16] As Justice Ginsburg noted in *ANZ*, "[a] recent study showed . . . that the time from the filing of a securities class complaint to the class-certification decision exceeds two years in 66% of cases

were unavailable, then absent class members would have strong incentives to file their own claims as a protective measure. This wave of protective filings would reverse the judicial economy benefits that the class action procedure is meant to achieve. *See Crown, Cork*, 462 U.S. at 351.

Petitioner's position here risks abandoning the benefits of *American Pipe*'s tolling rule by reviving absent class members' incentive to file their own claims. If tolling were unavailable for class claims, class members would still need to file their own protective claims if they wish to proceed as a class. Class certification is often both relatively uncertain and hotly contested, and absent class members who wish to proceed as part of a class actions would have to be very confident indeed that the initial named plaintiffs would succeed at certification in order to forego filing their own class claims.

Protective class filings are especially likely because many claims can *only* be brought as class claims. Where individual recoveries are likely to be small, plaintiffs will have little ability to attract legal counsel and sue on their own behalf. Hence, if Petitioner prevails here, one of two things will happen. One possibility is that a rule tolling only individual claims would simply undermine the enforcement of federal law in areas where small

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and exceeds three years in 36% of cases." 137 S. Ct. at 2057 n.2 (Ginsburg, J., dissenting) (citing S. Boettrich & S. Starykh, NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2016 Full–Year Review*, p. 23 (2017), available at http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year–End_Trends_Report_0117.pdf (as last visited June 19, 2017)).

individual claims are common. And even where there *are* large stakeholders—such as the California pension system in *ANZ*—with incentives and wherewithal to bring individual claims, Petitioner's tolling limit will create troubling inequalities in federal law enforcement. Large stakeholders with substantial resources will remain able to enforce their rights if an initial attempt at class certification fails, but smaller players will be left out in the cold.

The other possibility is that absent class members who could not plausibly file individual claims will simply file protective class claims to protect their right to proceed under Rule 23. There is reason to believe, however, that duplicative class claims are worse for the judicial system than duplicative individual claims. According to Petitioner, for example, class filings uniquely "require costly discovery" and "put[] tremendous pressure on defendants to settle even meritless claims." Pet. Br. at 20, 21. Whether or not those concerns are exaggerated in general, there is little doubt that, as compared to individual claims, protective *class* filings are even more likely to "gum up the works of class litigation." *ANZ*, 137 S. Ct. at 2058 (Ginsburg, J., dissenting).

II. THE RISK THAT TOLLING CLASS CLAIMS WILL LEAD TO ENDLESS FOLLOW-ON CLASS ACTIONS IS OVERSTATED.

Petitioner's primary argument for limiting *American Pipe* and *Crown, Cork* is grounded not in the logic of those decisions but in unvarnished considerations of policy. This Court should restrict class action tolling, they say, in order to prevent an

infinite regress of follow-on class actions. This risk is nonexistent, however, in the securities context of the present case. And were this Court to consider their other argument in other contexts not presented here, there are ample means to prevent the abuse of follow-on suits.

A. The applicable statute of repose prevents proliferation of follow-on class actions.

The short answer to Petitioner's concern about follow-on claims is that it is not properly before the Court, because the statutes of repose in the securities laws prevent proliferation of such claims. Petitioner is correct that "Congress has already chosen its preferred method of precluding repeated litigation of the same claim—i.e., by enacting a strict time limit that can only be extended in the rarest of circumstances." Pet. Br. at 4. But that limit is the period of *repose*, not the limitations period.

As this Court noted in *ANZ*, Section 13 of the Securities Act of 1933 contains both a 1-year statute of limitations and a 3-year statute of repose. *See* 15 U.S.C. § 77m. The limitations period runs from the discovery of a securities violation, while the repose period runs from the offering of the security. As Justice Kennedy explained, "[t]he two periods work together: The discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability." *ANZ*, 137 S. Ct. at 2049-50. Critically, *ANZ* held that *American Pipe* does *not* toll the repose period. *See id.* at 2055. Respondents' securities fraud claims are similarly subject to a two-tiered time bar: a 2-year statute of

limitations, and a 5-year statute of repose. *See* 28 U.S.C. § 1658(b). The statute of repose period cuts off any indefinite series of follow-on class actions in relatively short order.

Because Respondents' claims are subject to a repose period, Petitioner necessarily invites this Court to fashion a limit on *American Pipe* tolling based on concerns not presented by the current litigation. The Court should decline the invitation. If such a limit is to be fashioned, it should be done in a context that will actually allow the Court to explore the practical considerations actually in play. Whatever the import of Petitioner's policy argument in other statutory contexts, the Court should hold simply that *American Pipe* tolling applies where, as here, a repose statute cuts off the possibility of indefinite follow-on claims.

In any event, the combination of limitations and repose periods present in both the Securities Act and § 1658(b) is hardly an outlier. As Justice Kennedy noted in *ANZ*, "[t]he pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits." 137 S. Ct. at 2049.[17] If *American Pipe*'s application under statutes lacking such a rule causes problems in the future, Congress can add this familiar device to the relevant statutory regime. Or, given the equitable flexibility inherent in *American Pipe*'s rule, this Court would be free to fashion a limit on tolling once circumstances arose that require it.

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[17] *See also Gabelli v. SEC*, 568 U.S. 442, 453 (2013) ("[S]tatutes applying a discovery rule . . . often couple that rule with an absolute provision for repose.").

B. The appropriate limit to follow-on cases is comity, not an exception to *American Pipe*'s tolling rule.

Even setting aside repose periods applicable to securities claims, federal courts have ample means at their disposal to prevent indefinite follow-on class actions. This Court rejected a similar fear in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), which overturned a federal multi-district litigation court's injunction seeking to prevent a state court from certifying a class involving the same claims upon which the federal court had denied certification. In that case, as here, the defendants raised the spectre that plaintiffs will continue to file an infinite stream of class claims, effectively re-rolling the dice on class certification until they get the result that they seek. The Court unanimously rejected that argument, stating that "we would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 317.

Comity has several virtues over the Petitioner's rule for resolving concerns about follow-on class filings. First, comity is a flexible doctrine that allows courts to take into account the circumstances of particular cases. As such, it is far more consistent with the equitable roots of *American Pipe* than Petitioner's categorical rule against tolling class claims. Second, comity is a general principle of judicial cooperation and mutual deference, while Petitioner's rule is targeted exclusively at class actions. Hence, comity would avoid the *Shady Grove* problem associated with fashioning a judge-made restriction unique to class actions. Petitioner has provided no reason to believe that comity is an

inadequate tool for preventing abuse of the *American Pipe* rule.

III. PRESERVING *AMERICAN PIPE* TOLLING FOR CLASS ACTIONS IS NECESSARY IN ORDER TO MAINTAIN FAIRNESS.

Across our legal system—from civil rights to environmental law to antitrust and securities law—our law relies fundamentally on "private attorneys general" to enforce critical aspects of federal law.[18] The class action device has developed as a critical means of ensuring that private enforcement can vindicate these important federal interests. As this Court observed in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980),

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Id. at 339. Hence, one purpose behind the contemporary version of Rule 23 was "to provide a mechanism for allowing the joinder of related

[18] *See, e.g.*, *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982) (antitrust); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (securities); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (civil rights).

modest-sized claims held by a significant number of people that were economically unviable if obliged to be advanced one by one—what today we call negative-value cases." Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 Emory L.J. 293, 294 (2014).

This aspect of the class action device is particularly crucial to Amici, as many older individuals are persons of modest means unlikely to have claims large enough to make individual litigation economically feasible. Petitioner's position that *American Pipe* tolling is available only for individual claims would have the effect of substantially disfavoring class litigation. As noted above, class certification is frequently decided after the limitations period has run; tolling is thus crucial for any absent class member who subsequently wishes to pursue his or her claims. Under Petitioner's rule, the failure of the original named plaintiffs to secure class certification would bar any further effort to proceed as a class—even if the initial class certification motion were denied for limited reasons that cast no doubt on the suitability of a subsequent action for class treatment.

This effect would not fall equally on all litigants. Rather, large and well-resourced litigants, such as pension funds, large corporations, or wealthy individuals, might well have the incentive and wherewithal to file individual claims after a class failed to secure certification. But persons of modest means with modest claims—including many of Amici's members—may well be unable to pursue their claims at all in the absence of the class device.

That is why Petitioner is willing to contemplate the proliferation of individual claims against it following an unsuccessful effort to certify the class: Petitioner knows that, by and large, most plaintiffs will be unable to sue individually. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

It is wrong and unrealistic to say, as Petitioner does, that absent class members are not "diligent" if they do not pursue their claims on an individual basis. Persons of modest means typically do not pursue individual claims because they cannot afford to do so on their own, and they cannot attract counsel unless numerous claims can be aggregated in one lawsuit. They thus file class claims instead; that is the only feasible form of diligence available. Nothing in the relevant limitations provisions, Rule 23, or this Court's case law supports the notion that individual filings are "diligent" while class claims are not.

The roots of *American Pipe* tolling in equity provide an ample basis for taking into account the potential unfairness of Petitioner's rule. Both *American Pipe* and *Crown, Cork* emphasized that tolling limitations for absent class members is not unfair to defendants, because the initial class action filing puts them on notice of the claims and parties they confront. *See American Pipe*, 414 U.S. at 554-55; *Crown, Cork*, 462 U.S. at 352-53. But fairness to plaintiffs is relevant, too. This Court should not restrict tolling under *American Pipe* in such a way as to systematically favor large claimants over small

ones. Rather, this Court should preserve the function of class actions in enabling private enforcement of federal law by ensuring that small claimants can continue to bring class claims.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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